

REPORT

ON

CHILD WITNESSES

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY



The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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EXECUTIVE SUMMARY

In the *Report on Child Witnesses*, the Ontario Law Reform Commission attempts to achieve three principal objectives: (1) to challenge the assumptions on which many of our legal rules are based regarding the unreliability of children's evidence; (2) to encourage the Legislature to repeal legal rules which impede child witnesses from telling the court what they witnessed; and (3) to introduce protective devices into the legal system to ensure that the court receives as complete, coherent and accurate an account as possible from the child witness. The report demonstrates that many of the common law and statutory rules applicable to child witnesses are based on erroneous notions about the unreliability of children's testimony. Psychological studies conducted in the last twenty years show that the traditional views about children's evidence lack empirical foundation. The current research clearly indicates that children do have adequate cognitive skills to understand or to describe what they have witnessed, children can differentiate fact from fantasy, and children have an ethical sense and are no more likely to fabricate evidence than are adults.

The Commission recommends that the oath be abolished and that it be replaced with a promise to tell the truth. The rules in the Ontario *Evidence Act* have made it extremely difficult for children to be qualified as witnesses with the result that judges may be deprived of hearing potentially valuable evidence. The Commission's view is that the oath requirement is essentially a test of religious understanding rather than a test of the child's ability to understand the importance of being truthful. The transformation of Ontario from a religious to a largely secular society further accentuates the inappropriateness of the oath.

The Commission proposes that the provision in the *Evidence Act* requiring corroboration of a child's unsworn evidence be repealed. In addition, the Commission recommends that there be no rule of any kind that requires a court to assume that the uncorroborated evidence of a child is unreliable. The Commission makes these recommendations for the following reasons. First, there is no scientific basis for assuming that a child is incapable of furnishing reliable evidence. Second, there is often no direct evidence, either physical or eyewitness, to corroborate the child's testimony. A further reason for the abolition of these legal rules is that it is unreasonable and unfair to have such restrictive evidentiary rules for children and not for adult witnesses.

Reform of the hearsay rule for the statements of children is another important recommendation in the report. In many cases, the hearsay evidence of the child is the best evidence of the subject matter being litigated and constitutes the only substantive evidence of the subject of the proceedings. The Commission recommends that the hearsay statements of a child be admissible, if, in the opinion of the judge, the statements are sufficiently reliable. The court can then assess the weight to be accorded to the child's out-of-court statements. The Commission believes that this recommendation will introduce clarity into the law and will permit what may be extremely reliable evidence to be considered by the courts.

In the final section of the report, the Commission proposes that legislation should be introduced which accommodates children who give evidence in civil proceedings. The vulnerability of child witnesses should be acknowledged and the manner in which children give evidence modified accordingly. Legislation which authorizes videotaped testimony and which permits child witnesses to testify behind a screen or by closed-circuit television will help ensure that reliable evidence is presented and heard. Children should be protected in the court process in order to tell their story as easily, accurately and comprehensively as possible.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The oath should be abolished as a test of competency for child witnesses. A simple promise to tell the truth should be the qualification requirement for child witnesses in Ontario civil proceedings.
2. Where in the opinion of the court, a child does not understand the promise to tell the truth, the judge shall nevertheless hear the evidence and may act on it if, at the end of the case, the judge is satisfied that the evidence is reliable.
3. The presumption that a child under fourteen years is an incompetent witness should be abolished. The Ontario *Evidence Act* should be amended to provide that all individuals, including children, are presumed competent witnesses.
4. The distinction between sworn and unsworn testimony for child witnesses should be abolished.
5. The corroboration rule in section 18(2) of the Ontario *Evidence Act* for the unsworn testimony of the child should be repealed.
6. A child's testimony should not be automatically labelled as untrustworthy and unreliable solely because the evidence is being offered by a child. The rule in *Kendall v. The Queen* should be statutorily abolished.
7. The hearsay statements of a child are admissible if, in the opinion of the judge, the statements are sufficiently reliable.
8. All child witnesses should be permitted to testify behind a screen. In cases in which a screen is used, provision should be made to enable the party against whom the child is tendering evidence to watch the child and to observe his or her demeanour while giving evidence.
9. All child witnesses should be allowed to testify by closed-circuit television. In cases in which the child testifies by closed-circuit television, the party against whom the child is tendering evidence

should be permitted to communicate with counsel while watching the child's testimony.

10. Videotaped interviews of a child are admissible if, in the judge's discretion, the videotapes are sufficiently reliable.
11. Videotaped testimony of a child, in which the child is examined and cross-examined by counsel in advance of trial in the presence of a judge, should be permitted. Provision should be made to enable the party against whom the child is tendering evidence to view the proceedings through a one-way screen or through the medium of closed circuit television.
12. Child witnesses should be permitted to have the presence of a support person of their choice during their testimony. Unless the court consents, the support person should not be an individual who is involved as a witness in the proceedings.

RAPPORT

92-00448/

SUR

LE TÉMOIGNAGE DES ENFANTS

COMMISSION DE RÉFORME DU DROIT DE L'ONTARIO

SOMMAIRE



La Commission de réforme du droit de l'Ontario a été constituée en vertu de la *Loi sur la Commission de réforme du droit de l'Ontario* avec pour mission de réformer le droit, les procédures et les institutions juridiques.

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SOMMAIRE

Dans son rapport sur le témoignage des enfants (*Report on Child Witnesses*), la Commission de réforme du droit de l'Ontario vise trois principaux objectifs: 1) contester l'hypothèse sur laquelle sont basées un grand nombre de nos règles de droit sur l'absence de fiabilité du témoignage des enfants; 2) inciter la législature à abroger certaines règles de droit empêchant les enfants de raconter devant le tribunal, sous forme de témoignage, les événements dont ils ont été témoins; et 3) instaurer dans notre système judiciaire des mesures préventives veillant à ce que le tribunal reçoive, lors du témoignage d'un enfant, le récit le plus complet, cohérent et fidèle possible. Le rapport démontre que plusieurs de nos règles de droit ou de common law sur le témoignage des enfants sont fondées sur des notions erronées. Les études psychologiques des vingt dernières années indiquent que notre optique traditionnelle sur le témoignage des enfants ne repose pas toujours sur des bases empiriques. Les recherches actuelles démontrent clairement que les enfants possèdent des facultés cognitives suffisantes pour comprendre ou décrire les événements dont ils ont été témoins et peuvent établir une différence entre le réel et l'imaginaire; ils sont doués d'un sens de l'éthique et ne sont pas plus enclins que les adultes à fabriquer un témoignage.

La Commission recommande l'abolition du serment et son remplacement par une promesse de dire la vérité. Selon les règles de la *Loi sur la preuve* de l'Ontario, il est extrêmement difficile pour un enfant de qualifier comme témoin et de ce fait, les juges sont virtuellement privés de preuves précieuses. La Commission estime que le serment est davantage un test sur une croyance et un engagement religieux qu'une mesure pour assurer que l'enfant saisit l'importance de dire la vérité. Le passage en Ontario d'une société religieuse à une société séculaire, amplifie en outre le caractère inopportun du serment.

La Commission propose l'abrogation des dispositions de la *Loi sur la preuve* voulant que le témoignage de l'enfant n'ayant pas prêté serment soit corroboré. De plus, la Commission recommande l'abolition de toute règle obligeant le tribunal à présumer l'absence de fiabilité du témoignage non corroboré d'un enfant. La Commission fait ces recommandations en se fondant sur les motifs qui suivent. D'abord, il est scientifiquement erroné de supposer que l'enfant soit incapable de rendre un témoignage digne de foi. Deuxièmement, il est souvent impossible d'obtenir une preuve directe, matérielle ou oculaire, visant à corroborer le témoignage de l'enfant. Une

autre raison justifiant l'abolition de ces règles restrictives est leur aspect déraisonnable et injuste, ces dernières s'appliquant au témoignage des enfants et non à celui des adultes.

La réforme des règles du oui-dire concernant les déclarations de l'enfant constitue une autre importante recommandation du rapport. L'oui-dire des paroles de l'enfant constitue souvent la meilleure preuve des faits reprochés et la seule preuve positive au cours d'une poursuite. La Commission recommande que les déclarations de l'enfant rapportées par oui-dire soient recevables si le juge estime qu'elles sont suffisamment fiables. Le tribunal pourra alors juger du poids à accorder aux déclarations hors-cour faites par l'enfant. La Commission estime que cette recommandation clarifiera la loi et permettra aux tribunaux d'examiner, à l'occasion, des preuves d'une extrême fiabilité.

Au dernier chapitre du rapport, la Commission propose l'introduction de mesures législatives visant à mieux accommoder les enfants appelés à témoigner dans les instances civiles. Cette proposition répond à un besoin de reconnaître la vulnérabilité de l'enfant témoin et de modifier conséquemment les façons dont il peut témoigner. L'adoption de lois permettant des témoignages sur vidéocassette et autorisant un enfant témoin à témoigner derrière un paravent ou au moyen de télévision en circuit fermé, rendrait possible la présentation et l'audition de preuves fiables. L'enfant devrait être mieux protégé dans le processus judiciaire; son récit serait alors plus naturel, minutieux et articulé.

SOMMAIRE DES RECOMMANDATIONS

La commission fait les recommandations suivantes:

1. Le serment visant à juger la compétence de l'enfant appelé à témoigner devrait être aboli. Une simple promesse de dire la vérité dans les instances civiles en Ontario devrait être exigée de l'enfant témoin.
2. Si le tribunal estime que l'enfant ne saisit pas le sens de la promesse de dire la vérité, le juge doit quand même entendre son témoignage et peut procéder en vertu de ce témoignage s'il est convaincu, avant de rendre jugement, de la fiabilité du témoignage.
3. La présomption selon laquelle l'enfant âgé de moins de quatorze ans soit un témoin inhabile à témoigner devrait être abolie. La *Loi sur la preuve* de l'Ontario devrait être modifiée de façon à stipuler que toutes les personnes, y compris les enfants, sont réputées des témoins compétents.
4. La distinction entre le témoignage sous serment et le témoignage sans serment de l'enfant témoin devrait être abolie.
5. La règle du paragraphe 18(2) de la *Loi sur la preuve* de l'Ontario concernant la corroboration du témoignage sans serment de l'enfant devrait être abolie.
6. Le témoignage d'un enfant ne devrait pas être systématiquement qualifié de douteux et peu fiable uniquement parce qu'il est rendu par un enfant. La règle de *Kendall c. La Reine* devrait être abolie par voie législative.
7. Les déclarations de l'enfant rapportées par oui-dire sont recevables si le juge estime qu'elles sont suffisamment fiables.
8. Tout enfant témoin devrait pouvoir témoigner derrière un paravent. Dans les causes où un paravent est utilisé, la partie contre laquelle le témoignage de l'enfant est rendu devrait pouvoir voir l'enfant et surveiller son comportement pendant son témoignage.

9. Tout enfant témoin devrait pouvoir témoigner au moyen de télévision en circuit fermé. Dans les causes où l'enfant témoigne au moyen de télévision en circuit fermé, la partie contre laquelle le témoignage de l'enfant est rendu devrait pouvoir communiquer avec son avocat pendant qu'il regarde l'enfant témoigner.
10. Les entrevues enregistrées sur vidéocassette sont recevables si les vidéocassettes sont, à la discrétion du juge, suffisamment fiables.
11. Le témoignage sur vidéocassette d'un enfant interrogé et contre-interrogé préalablement au procès par un avocat, en présence d'un juge, devrait être permis. La partie contre laquelle le témoignage de l'enfant est rendu devrait pouvoir regarder les procédures derrière un paravent à sens unique ou au moyen de télévision en circuit fermé.
12. L'enfant témoin devrait pouvoir témoigner en compagnie d'une personne soutien de son choix. A moins que le tribunal n'y consente, une personne servant de témoin au cours des procédures, ne devrait pouvoir être une personne-soutien.

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**Ontario
Law Reform
Commission**

To The Honourable Howard Hampton
Attorney General for Ontario

Dear Attorney General:

We have the honour to submit our *Report on Child Witnesses*.

Rosalie S. Abella
Chair

Richard E. B. Simeon
Vice Chair

Earl A. Cherniak
Commissioner

John D. McCamus
Commissioner

Margaret A. Ross
Commissioner

July 2, 1991

PREFACE

The Commission's *Report on Child Witnesses* was initiated in June 1990. Ronda Bessner, Counsel at the Commission, conducted the research and wrote the report.

An Advisory Board was established by the Commission, composed of individuals from various disciplines and organizations. The Commission would like to express its deep appreciation to the members of the Board, who made a significant contribution to the reforms proposed by the Commission: Hugh Atwood, Office of the Official Guardian; Nicolas Bala, Queen's University Law School; Judith Beaman, from the law firm of Dunbar, Sachs, Appell; Joan Belford, Children's Services Branch, Ministry of Community and Social Services; Marvin Bernstein, Catholic Children's Aid Society; Kerry Evans, from the law firm of Zwicker, Evans & Lewis; Shelley Hallett, Court Reform Task Force, Ministry of the Attorney General; Susan Himel, Support & Custody Enforcement Branch, Ministry of the Attorney General; Heather Katarynych, Children's Aid Society of Metropolitan Toronto; Susan Lee, Provincial Coordinator, Victim/Witness Services, Ministry of the Attorney General; Myra Lefkowitz, Metropolitan Toronto Special Committee on Child Abuse; Dr. Sol Levine, Sunnybrook Hospital; Michael Martin, Assistant Crown Attorney, Regional Municipality of Peel, Ministry of the Attorney General; Chris McGoey, Assistant Crown Attorney, Victim/Witness Services, Ministry of the Attorney General; Cindy Merkley, Coordinator, Aftermath: Self-Help for Families of Sexually Abused Children; Dr. Marcellina Mian, Suspected Child Abuse & Neglect Program, Hospital for Sick Children; Judge Peter Nasmith, Ontario Court, Provincial Division; John Pepper, Crown Attorneys Office, Ministry of the Attorney General; Dr. Louise Sas, Principal Investigator, London Family Court Clinic Inc.; Patricia Sibbald, Institute for the Prevention of Child Abuse; Ann Marie Wicksted, Barrie District Rape Crisis Line; and Robin Vogl, Barrister and Solicitor. In addition, the Commission advertised for submissions. The Commission would like to thank the organizations and individuals who responded to the issues discussed in the advertisements.

Finally, the Commission would like to express its appreciation to Dr. Louise Sas who reviewed the chapter on the psychological studies on the reliability of children's testimony and to Chris McGoey who throughout the project, participated in numerous discussions and provided the Commission with valuable material on child witnesses.

INTRODUCTION

The laws in Ontario affecting child witnesses are in need of fundamental reform. It is time for the Legislature and courts of Ontario to ensure that the legal rules which apply to young witnesses are based on modern empirical studies respecting the testimonial capabilities of children and not on antiquated and erroneous notions about the frailty of children's evidence. It is also time for the legal system to address the issue of the psychological impact on a child who comes into contact with the justice system.

Since the 1950's, and more particularly in the last decade, many countries such as Israel, Germany, United States, Scotland, England, Australia and Scandinavia, have reformed the civil and criminal laws applicable to child witnesses.¹ Statutes that once prevented children from qualifying as witnesses have been amended to reflect the psychological studies on the testimonial capacity of young witnesses. Strict evidentiary rules, such as the rule against hearsay evidence, have either been abrogated or liberalized to ensure that a child's account of what transpired is presented to the court. Most of these legal systems have also introduced protective mechanisms such as closed-circuit television and screens into the courtroom, in order to minimize the anxiety of children who offer evidence in legal proceedings.²

In 1988, Bill C-15 entitled *An Act to amend the Criminal Code and the Canada Evidence Act*³ came into force. Bill C-15 relaxed the federal competency rules in the *Canada Evidence Act*⁴ governing children and it abolished the corroboration requirement for the testimony of child witnesses. In addition, amendments to the *Criminal Code*⁵ were introduced that offer

¹ See J.R. Spencer and R. Flin, *The Evidence Of Children*[:] *The Law and The Psychology* (London, England: Blackstone Press, 1990) and J.R. Spencer, G. Nicolson, R. Flin and R. Bull (eds.), *Children's Evidence in Legal Proceedings*[:] *An International Perspective* (Cambridge, England: 1989) (Papers from an international conference, Selwyn College Cambridge Lectures).

² See authorities cited *ibid.*, note 1.

³ S.C. 1987, c. 24, now R.S.C. 1985, c. 19 (3rd Supp.).

⁴ R.S.C. 1985, c. C-5, s. 16, as rep. and sub. by R.S.C. 1985, c. 19 (3rd Supp.), s. 18.

⁵ R.S.C. 1985, c. C-46, ss. 486, as am. by R.S.C. 1985, c. 19 (3rd Supp.), s. 14, and 715.1, as en. by R.S.C. 1985, c. 19 (3rd Supp.), s. 16.

protections to child victims of sexual abuse who give evidence in criminal proceedings.

Over the past few years, there has been a rise in the number of children who have been witnesses in Ontario civil trials. Children are often important eyewitnesses to road accidents⁶ and crucial witnesses to domestic disputes. Children are also directly involved in the legal system when they are victims of sexual or physical abuse.⁷ Heightened public awareness of the magnitude and severity of abuse has resulted in increased reporting of abuse cases.⁸ Mandatory reporting laws which require professionals such as teachers and doctors to report cases of suspected child abuse is a further factor in the increased number of cases involving child witnesses.⁹

The Canadian government recently released two significant studies, the Badgley Report¹⁰ and the Rogers Report,¹¹ which state in unequivocal terms that the incidence of child sexual abuse in this country is widespread. According to the statistics, one in four girls and one in ten boys will be

⁶ J.C. Yuille, M.A. King and D. MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (Ottawa: Department of Justice Canada, 1988), at 4; G. Davies, R. Flin and J. Baxter, "The Child Witness" (1986), 25 Howard J. 81, at 81-82; J.Y. Parker, "The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?" (1982), 17 New Eng. L. Rev. 643, at 647. See, also, Law Reform Commission of Western Australia, *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Perth, Australia: April 1990), at 915.

⁷ M. Mian, K. Haka-Ikse, M. Lefkowitz and C. McGoey, "The Child As Witness" (Toronto: March 1990), at 1; London Family Court Clinic, *Reducing the System-Induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-Up* (London, Ont.: January 1991); S. Penrod, M.A. Bull, S. Lengnick, "Children as Observers and Witnesses: The Empirical Data" (1989), 23 Fam. L.Q. 411; and American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* (Washington, D.C.: May 1985).

⁸ L.S. Boerma, "How to Overcome Barriers and to Develop Creative and Innovative Approaches in the Prosecution of Child Sexual Abuse Cases" (1985) in *Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases[:] A Report of the American Bar Association Child Sexual Abuse Law Reform Project* (Washington, D.C.: National Legal Resource Centre for Child Advocacy and Protection, 1985) 31, at 33; and J. Bulkley, "Introduction: Background and Overview Of Child Sexual Abuse[:] Law Reforms in the Mid-1980's" (1985), 40 U. Miami L. Rev. 5, at 6.

⁹ *Child and Family Services Act 1984*, S.O. 1984, c. 55, ss. 68 and 81(1)(b).

¹⁰ Canada, *Sexual Offences Against Children[:] Report of the Committee on Sexual Offences Against Children and Youths* (Chair: R.F. Badgley) (Ottawa: 1984), Vol. 1, at 29 and 80.

¹¹ R.G. Rogers, *Reaching for Solutions: The Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* (Ottawa: Health and Welfare Canada, June 1990), at 9 and 13.

victims of unwanted sexual acts before they reach the age of eighteen.¹² It is estimated that over 100,000 children in Canada are physically abused each year.¹³

Although many more cases are entering the legal system, Ontario's legal rules continue to be a substantial impediment to the reception of children's evidence. A significant number of children are precluded from testifying because they are unable to satisfy the competency requirements in the Ontario *Evidence Act*.¹⁴ In cases in which children are permitted to give evidence, their testimony has been discounted as inherently unreliable. For instance, the credibility of a child is questioned by the requirement of corroboration in the *Evidence Act*¹⁵ for the unsworn testimony of a child. In addition, judges continue to deliver special instructions regarding the frailties of children's testimony.¹⁶ The essential problem with these common law and statutory rules is that they are based upon generalizations about children's evidence which empirical studies in the past twenty years have proven erroneous.¹⁷ These rules reflect the view that children's testimony is untrustworthy because:

- (1) children do not have adequate cognitive skills to either understand or accurately describe what they witnessed;
- (2) children have no ethical sense and are prone to fabricate; and
- (3) children have difficulty differentiating fact from fantasy.

There has also been failure on the part of many lawyers and judges to understand fully the psychological impact on a child witness who furnishes

¹² Statistics provided by the Institute for the Prevention of Child Abuse (Toronto, 1990); and Metropolitan Toronto Special Committee on Child Abuse, *Child Sexual Protocol[:]* *Guidelines and Procedures for a Coordinated Response to Child Sexual Abuse in Metropolitan Toronto* (2d ed.) (Toronto: June 1986). See, also, *R. v. Levogiannis* (1990), 1 O.R. (3d) 351, 62 C.C.C. (3d) 59 (C.A.).

¹³ Institute for the Prevention of Child Abuse, *ibid.*, note 12.

¹⁴ R.S.O. 1980, c. 145, s. 18(1).

¹⁵ *Ibid.*, s. 18(2).

¹⁶ *Kendall v. The Queen*, [1962] S.C.R. 469, 32 C.C.C. 216; *Horsburgh v. The Queen*, [1967] S.C.R. 746, 63 D.L.R. (2d) 699; and *R. v. Khan*, unreported (April 5, 1991, Ont. Ct. (Gen. Div.)). See chapter 3.

¹⁷ Yuille, King and MacDougall, *supra*, note 6, at 1.

evidence in court.¹⁸ Mental health professionals assert that involvement in legal proceedings can have a disturbing effect on the mental and emotional health of a child.¹⁹ For example, a disclosure of intra-familial abuse may result in the disintegration of the child's family, a significant change in the economic status for the child, or the placement of the child in a foster home separated from his or her family.²⁰ Recounting the details of the abuse, undergoing cross-examination, and being only a few feet away from the perpetrator of the abuse in the courtroom, are undoubtedly extremely traumatic for the child.²¹

Many writers are highly critical of legal systems, like Ontario's, that are designed exclusively for adults.²² As one author²³ observes:

In almost all aspects, our society responds to children as individuals with unique characteristics and needs that are fulfilled by specially trained persons or specialized procedures. It seems ironic, therefore, that the... justice system ... is one of the last areas of society to recognize that specialized procedures are needed when children enter that system.

The movement in several jurisdictions to accommodate children in the court process has two main objectives: (1) to minimize the potential psychological harm to the child; and (2) to enhance the ability of the court to ascertain the truth. It is believed that the ultimate goal of the trial process will be frustrated if child witnesses, with their particular vulnerabilities, are not

¹⁸ *Ibid.* Spencer and Flin, *supra*, note 1, at 282-83; D.C. Raskin and J.C. Yuille, "Problems in Evaluating Interviews of Children in Sexual Abuse Cases" in S.J. Ceci, D.F. Ross and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989) 184, at 189; Yuille, King and MacDougall, *supra*, note 6, at 1.

¹⁹ See authorities cited *supra*, note 18; and C.L. Marchese, "Child Victims of Sexual Abuse: Balancing A Child's Trauma Against The Defendant's Confrontation Rights—*Coy v. Iowa*" (1990), 6 J. Contemp. Health L. & Pol'y. 411, at 415.

²⁰ Raskin and Yuille, *supra*, note 18; N. Bala, *Bill C-15: New Protections For Children - New Challenges For Professionals* (Toronto: Institute for the Prevention of Child Abuse, October 1988), at 13.

²¹ See authorities cited *supra*, notes 19 and 20.

²² M. Rosenberg, "Research and Clinical Issues in the Investigation of Child Sexual Abuse" (1990), *The Child, Youth, and Family Services Quarterly* (American Psychological Association) (Vol. 13, No. 3), at 1; J.-G. Lebel, "Reducing the trauma of testifying: Bill C-15 and the child victim" (Toronto: Institute for the Prevention of Child Abuse, 1989); and J.A. Lipovsky, "Innovative Practices for Sexually Abused Children in the Court System: Where are they Needed?" (1990), 13 *The Child, Youth, and Fam. Services Quarterly* (American Psychological Association) (Vol. 13, No. 3), at 8.

²³ B. McAllister, "Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom" (1986), 18 *St. Mary's L.J.* 279, at 280.

treated with more sensitivity in the court system.²⁴ There is a growing realization that a legal system which exacerbates rather than minimizes the anxiety of a child, may be responsible for incoherent or incomplete testimony.²⁵ Some child witnesses have been so traumatized that they have refused to give evidence, with the result that proceedings have been forced to come to a halt. As Spencer and Flin state, "it is vital—sometimes quite literally so—that the law should provide a workable means by which a child can tell his story to the court, and the court can evaluate it".²⁶

Members of the legal profession, as well as social workers, child psychologists, and members of the police force, have been strong advocates of reform of the laws of Ontario which affect child witnesses.²⁷ Moreover, the Badgley Report²⁸ recommended that each province amend its respective statutes to reflect the fact that the testimony of children is as trustworthy as the evidence furnished by adults. The 1990 Rogers Report²⁹ also urged the provinces to reform their laws governing the evidence of children. Recommendation 43³⁰ of the report proposes:

that provincial/territorial governments amend their legislation to facilitate the giving of evidence by children in civil cases. They should expand the scope for use of videotapes and out-of-court statements of children, and should at least ensure that child witnesses receive all the benefits of Bill C-15.

To date, only two provinces, British Columbia³¹ and Saskatchewan,³² have introduced legislation to essentially reflect the provisions contained in Bill C-15. In Ontario, the ironic situation which exists is that the evidentiary rules applicable to child witnesses in criminal prosecutions are less restrictive

²⁴ C.F. Graham, "Sequestration Screen for Young Complainants in Criminal Prosecutions: Early Developments in Canada" (1990), 32 *Crim. L.Q.* 227, at 230.

²⁵ Spencer and Flin, *supra*, note 1, at 282; J. McEwan, "In the Box or on the Box? The Pigot Report and Child Witnesses," [1990] *Crim. L. Rev.* 363, at 364.

²⁶ Spencer and Flin, *supra*, note 1, at 1.

²⁷ Consultations by Ontario Law Reform Commission 1990-1991, O.L.R.C. Advisory Board Meeting January 31, 1991, and Submissions on O.L.R.C. Child Witness Project.

²⁸ *Supra*, note 10, at 69.

²⁹ *Supra*, note 11, at 19.

³⁰ *Ibid.*, at 24-25.

³¹ *Miscellaneous Statutes Amendment Act (No. 2) 1988*, S.B.C. 1988, c. 46, s. 29, enacting s. 82 of the *Evidence Act*, R.S.B.C. 1978, c. 116.

³² *The Saskatchewan Evidence Amendment Act, 1989*, S.S. 1989-90, c. 57, s. 4, enacting ss. 42-42.3 of the *Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16.

and more sensitive to the needs of young witnesses than those applied in civil proceedings.³³

The Ontario Law Reform Commission begins this report with a description of the modern psychological studies on the reliability of evidence furnished by children. Chapter 2 of the Report is devoted to a critical analysis of the competency requirements as well as the corroboration rule in the Ontario *Evidence Act*³⁴. In chapter 3, the *Kendall* rule,³⁵ or the common law practice of instructing the trier of fact on the frailties of children's evidence, will be discussed. In chapter 4, the Commission addresses the issue of whether a statutory exception to the hearsay rule should be promulgated by the Ontario Legislature. Finally, chapter 5 canvasses the issue of whether devices such as closed-circuit television, screens or videotaped testimony, should be introduced into Ontario courtrooms.

The challenge of Ontario's judicial system is to integrate the legal requirements regarding the evidence of children with the knowledge of the memorial, linguistic and intellectual capabilities of young witnesses. The Commission takes the position that it is imperative that lawyers and judges in Ontario no longer be constrained by archaic rules of evidence. As an Ontario judge³⁶ aptly states:

We must not be afraid of the truth; we must allow the child's voice to be heard. We must have definitions and guidelines from the legislatures as well as clear and consistent rulings from the courts....

³³ See A.P. Nasmith, *The Inchoate Voice* (Toronto: 1990), at 36; and D.A.R. Thompson, "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings - Part I" (1988), 7 Can. J. Fam. L. 11, at 38.

³⁴ *Supra*, note 14, s. 18(2).

³⁵ *Kendall v. The Queen*, *supra*, note 16.

³⁶ Nasmith, *supra*, note 33, at 42. This statement was made in the context of family law proceedings.

CHAPTER 1

PSYCHOLOGICAL STUDIES ON THE RELIABILITY OF CHILDREN'S TESTIMONY

1. INTRODUCTION

An upsurge of interest in cognitive psychology and child development in the last twenty years has resulted in a reassessment of the intellectual abilities and the moral capacity of the child witness.¹ Social scientists have established in empirical research that children have been greatly undervalued as witnesses. A plethora of studies conducted in various jurisdictions such as United States, England, Ireland, Australia, Scotland, as well as Canada, have concluded that a child can furnish as accurate an account of an event as an adult.² Leading psychologists and psychiatrists contend that children as young as three years old are capable of giving reliable accounts of events which they have witnessed.³

¹ J.R. Spencer and R. Flin, *The Evidence of Children*[:] *The Law and the Psychology* (London, England: Blackstone Press, 1990), at 238; and G. Davies, R. Flin and J. Baxter, "The Child Witness" (1986), 25 *Howard J.* 81, at 87.

² D.J. Foté, "Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform" (1985), 13 *Pepperdine L. Rev.* 157; J.R. Christiansen, "The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews" (1987), 62 *Wash. L. Rev.* 705, at 707; J.C. Yuille, M.A. King and D. MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (Ottawa: Department of Justice Canada, Ottawa: 1988), at 27; and Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Edinburgh, Scotland: 1990), at 2. See, also, Law Reform Commission of Ireland, *Report on Child Sexual Abuse* (September 1990).

³ J. McEwan, "Child Evidence: More Proposals for Reform", [1988] *Crim. L. Rev.* 813; K.V. Lipez, "The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment and Controversy" (1990), 42 *Me. L. Rev.* 282, at 345; D.P.H. Jones, "The Evidence of a Three-Year-Old Child" [1987] *Crim. L. Rev.* 677; A. Yates, "Should Young Children Testify in Cases of Sexual Abuse?" (1987), 144 *Am. J. Psychiatry* 476, at 478; and D.C. Raskin and J.C. Yuille, "Problems in Evaluating Interviews of Children in Sexual Abuse Cases" in S.J. Ceci, D.F. Ross, and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989) 184, at 190.

The recent social science literature on the testimonial abilities of children is not solely responsible for challenging the conventional assumptions about the powers of recall and the veracity of evidence of young witnesses. There is now an understanding of the degree to which adult memory can be fraught with frailties. As Spencer and Flin state, "[r]ecent forensic research has also highlighted the ubiquitous imperfections of adult testimony, showing that mature witnesses' memories can be fragile and susceptible to the distorting influences of suggestion and misinformation".⁴ Studies conducted on the eyewitness testimony of adults demonstrate that adults may fail to observe some aspects of an event, may disorder parts of what transpired, and may actually forget segments of an incident which they have witnessed.⁵ Therefore, it is essential not to focus on children's evidence in absolute terms but rather to examine the reliability of children's evidence relative to the testimonial abilities of adults in similar circumstances.⁶

Children's evidence has traditionally been considered to be unreliable for four principal reasons. For over a century, the prevalent view has been that: (1) children have poor memories; (2) children have great difficulty distinguishing fact from fantasy; (3) children are highly suggestible; and (4) children are untrustworthy and do not have a sense of a moral obligation to speak the truth.⁷

The purpose of this chapter is to describe the modern psychological studies which challenge the traditional notions about the testimonial abilities of young witnesses. Woven through the sections of this chapter is a description of the methods used by professionals to elicit the valuable testimony that young children are capable of offering.

2. THE MEMORY OF CHILDREN

The vast proportion of social scientists who have studied children's memory in the last two decades do not subscribe to the view that memory

⁴ Spencer and Flin, *supra*, note 1, at 238.

⁵ E.F. Loftus, *Eyewitness Testimony* (Cambridge, Mass.: Harvard University Press, 1979); and G.S. Goodman and V.S. Helgeson, "Child Sexual Assault: Children's Memory and the Law" (1988), 12 *Prov. Judges J.* 17, at 18. See, also, Canada, *Sexual Offences Against Children*; Report of the Committee on Sexual Offences Against Children and Youths (Chair: R.F. Badgley) (Ottawa: 1984), Vol. 1, at 67.

⁶ H. Lilles, "Children as Witnesses: Some Legal and Psychological Viewpoints" (1986), 5 *Can. J. Fam. L.* 237, at 242.

⁷ See Spencer and Flin, *supra*, note 1, at 238.

is a function of age.⁸ A general consensus has emerged that memory is not simply an increase in the size of the memory box: rather, the ability to remember information is dependent on factors such as contextual cues, mnemonic techniques, emotional state, and prior knowledge.⁹ According to modern research, the memory process matures early and even very young children are able to retain accurate memories of characters and events.¹⁰ Psychological experiments demonstrate that children as young as three years old perform as well as adults on recognition memory skills.¹¹ Moreover, a child who has good knowledge of a particular subject matter, such as cars, will likely recall more information than an adult on that subject in a standard memory test.¹²

Yates, an American psychiatrist, recounts a case which supports the view that "[v]ery young children can remember extremely traumatic events... with indelible, highly accurate and detailed visual images".¹³ A child, who was barely three years old, was kidnapped, sexually abused, dropped into a cesspit and abandoned. Seventy hours later, the child was found alive. Five days after the abduction, the child described the events to the police and repeatedly identified the offender from a series of photographs. The child's report was confirmed fifteen months later through the confession of the man she had identified as the perpetrator. The confession contained the same details as had been provided by the child in her interview with the police.¹⁴

Leading psychologists such as Gail Goodman explain that the reason former studies underestimated children's recall abilities is that these experiments lacked "ecological validity".¹⁵ That is, the child subjects were

⁸ C. Hedderman, *Children's Evidence: The Need for Corroboration* (Research and Planning Unit Paper 41) (London, England: Home Office, 1987), at 15; Raskin and Yuille, *supra*, note 3, at 190; S. Rozell, "Are Children Competent Witnesses?: A Psychological Perspective" (1985), 63 Wash. U.L.Q. 815, at 820; Yates, *supra*, note 3, at 478; and G.B. Melton, "Children's Competency to Testify" (1981), 5 Law & Hum. Behav. 73, at 82.

⁹ Spencer and Flin, *supra*, note 1, at 239.

¹⁰ Rozell, *supra*, note 8, at 820.

¹¹ Lipez, *supra*, note 3, at 345; and Yates, *supra*, note 3, at 478.

¹² Spencer and Flin, *supra*, note 1, at 239; Yuille, King and MacDougall, *supra*, note 2, at 21; and McEwan, *supra*, note 3, at 817.

¹³ Yates, *supra*, note 3, at 478.

¹⁴ *Ibid.*

¹⁵ G.S. Goodman, L. Rudy, B.L. Bottoms, and C. Aman, "Children's Concerns and Memory: Ecological Issues in the Study of Children's Eyewitness Testimony" (unpublished paper), at 13; and G.S. Goodman, B.L. Bottoms, B.B. Herscovici and P. Shaver, "Determinants of the Child Victim's Perceived Credibility" in S.J. Ceci,

exposed to non-engaging events in stories, cartoons and films and they were questioned about peripheral details rather than the main actions that occurred.¹⁶ A widely-shared view among psychologists is that most witnesses, regardless of age, tend to remember central actions rather than peripheral detail.¹⁷ In addition, matters of personal significance to children, such as physical safety, fear of abandonment and fear of embarrassment, have a powerful effect on memory.¹⁸ As the United States National Legal Resource Center for Child Advocacy and Protection states, empirical research in the past has failed to examine children's abilities in "real-life" contexts such as experiencing a traumatic event or being victimized: the studies have failed "to assess issues such as the effect of a personally important or emotional event upon a child's memory".¹⁹

It has been acknowledged that ethical constraints make it difficult to subject laboratory participants to stressful events, particularly aversive events.²⁰ However, social scientists have been urged to direct their research to naturally occurring stressful situations in order to study the effect of emotional arousal on children's memory for personally significant events.²¹ For example, a child's first visit to the dentist for a filling, the first day at nursery school or a child's first piano recital, are all potentially stressful events which can be exploited for the study of children's memory. Goodman and her colleagues have tested children three to seven years old who had been scheduled for inoculations and routine blood samplings and assessed their memory of the procedure.²²

D.F. Ross, and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989) 1, at 18.

¹⁶ Goodman, Rudy, Bottoms and Aman, *supra*, note 15, at 13; and Goodman, Bottoms, Herscovici and Shaver, *supra*, note 15, at 18.

¹⁷ Spencer and Flin, *supra*, note 1, at 241.

¹⁸ Goodman, Rudy, Bottoms and Aman, *supra*, note 15, at 4, 7-8, and 44.

¹⁹ R. Eatman and J. Bulkley, *Protecting Child Victim/Witnesses[:] Sample Laws and Materials* (American Bar Association, National Legal Resource Center for Child Advocacy and Protection, 1986), at 64.

²⁰ Goodman, Rudy, Bottoms and Aman, *supra*, note 15, at 5; and Spencer and Flin, *supra*, note 1, at 246.

²¹ See authorities cited, *supra*, note 20.

²² *Ibid.*, and B.L. Bottoms, G.S. Goodman, L. Rudy, L. Port, P. England, C. Aman, and M.E. Wilson, "Children's Testimony for a Stressful Event: Improving Children's Reports" (August 1989) (paper presented at the 97th Psychological Association, New Orleans, La.).

The most salient and consistent age difference in witnesses is that of free recall.²³ Free recall is when the subject is requested to recount everything that he or she remembers about a particular event without prompting.²⁴ Young children generally know much more than they can spontaneously recount and, as a result, require cues, such as direct questions, to stimulate recall.²⁵ By the age of ten to twelve years, a child can generally recall the same amount of information as an adult.²⁶

Although the best method to elicit accurate information is by free recall, the younger the child, the more likely the interviewer will find it necessary to resort to specific questions when interviewing the child witness.²⁷ It is therefore essential that the young child be skilfully interviewed to ensure that the interrogation procedures used elicit information with minimal distortion.

Free recall is as accurate in children as it is in adults.²⁸ In fact, studies have demonstrated that accounts of events by children under six years old are least likely to contain inaccuracies.²⁹ It is for this reason that it is stated that children's reporting errors tend to be acts of omission rather than acts of commission.³⁰ An omission is defined as not reporting something that did happen, while a commission is relating events that did not in fact occur.³¹ Although children may freely recall less information than adults, the information they do recall is generally accurate. By contrast, while adults

²³ Spencer and Flin, *supra*, note 1, at 240; Goodman and Helgeson, *supra*, note 5, at 19; Goodman, Rudy, Bottoms and Aman, *supra*, note 15, at 19; Melton, *supra*, note 8, at 77; M.K. Johnson and M.A. Foley, "Differentiating Fact From Fantasy: The Reliability of Children's Memory" (1984), 40 J. of Soc. Issues 33, at 35; and E.F. Loftus and G.M. Davies, "Distortions in the Memory of Children" (1984), 40 J. Soc. Issues 51, at 62.

²⁴ Spencer and Flin, *supra*, note 1.

²⁵ Melton, *supra*, note 8, at 77.

²⁶ M. Mian, K. Haka-Ikse, M. Lefkowitz and C. McGoe, "The Child As Witness" (Toronto: March 1990) (unpublished paper), at 5.

²⁷ Raskin and Yuille, *supra*, note 3, at 191; and Yuille, King and MacDougall, *supra*, note 2, at 21.

²⁸ Yuille, King and MacDougall, *ibid.*, at 21; Yates, *supra*, note 3, at 477; Mian, Haka-Ikse, Lefkowitz and McGoe, *supra*, note 26, at 5; and Spencer and Flin, *supra*, note 1, at 240.

²⁹ Mian, Haka-Ikse, Lefkowitz and McGoe, *supra*, note 26, at 5.

³⁰ G. Goodman and R. Reed, "Age Difference in Eyewitness Testimony" (1986), 10 Law & Hum. Behav. 317, at 329; Goodman and Helgeson, *supra*, note 5, at 19; Mian, Haka-Ikse, Lefkowitz and McGoe, *supra*, note 26, at 5; and Spencer and Flin, *supra*, note 1, at 240.

³¹ Spencer and Flin, *supra*, note 1, at 241.

spontaneously recall more information than their younger counterparts, they recall more incorrect information.³²

The foregoing studies on the memory of children indicate that children from the age of three to four years have the capacity to provide reliable information about a particular event, and that the memory of a witness is not directly related to the age of the individual.

3. ARE CHILDREN CAPABLE OF DISTINGUISHING FACT FROM FANTASY?

The pervasive belief is that children have great difficulty in discriminating what they perceive from what they imagine.³³ As a legal academic states, "children are prone to live in a make-believe world, so that they magnify incidents which happen to them or invent them completely".³⁴ In addition, influential child development theorists have emphasized that children are often incapable of distinguishing fact from fantasy. Freud, for example, as well as Stern and Varendonck have been responsible for propagating the view that child sexual and physical abuse is extremely rare and generally the product of a child's fantasy.³⁵

The crucial issue is not whether children engage in imaginative play but whether children are able to distinguish fact from fantasy in the context of witnessed events. Studies confirm that although pre-schoolers frequently play imaginary games, they are capable of discerning fact from reality.³⁶ Psychological and medical research conducted in the past two decades has demonstrated that children are not prone to fantasize about the type of incidents that are the subject of court proceedings, such as road accidents or

³² See authorities cited, *supra*, note 30.

³³ Johnson and Foley, *supra*, note 23, at 45. See, also, R.K. Oates, "Children as Witnesses" (1990), 64 Aust. L.J. 129, at 131.

³⁴ J.D. Heydon, *Cases and Materials on Evidence* (2d ed.) (London: Butterworths, 1984), at 84.

³⁵ Goodman, Rudy, Bottoms and Aman, *supra*, note 15, at 43; B.W. Boat and M.D. Everson, "When The Tail Wags The Dog[?]: The Response to Legal Challenges of the Credibility of Children's Allegations of Sexual Abuse" (1990), *The Child, Youth and Family Services Quarterly* (American Psychological Association) (Vol. 13, No. 3), at 2; and G.S. Goodman, "Child Sexual Abuse: The Search for Professional Agreement and 'Relevant' Research on Children's Reports" (1990), *The Child, Youth, and Family Services Quarterly* (American Psychological Association) (Vol. 13, No. 3), at 4.

³⁶ B. McAllister, "Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom" (1986), 18 St. Mary's L.J. 279, at 299.

physical or sexual abuse.³⁷ It is in fact stated that the cognitive and imaginative capacities of young children simply do not enable them to fantasize about sexual episodes, particularly in the explicit detail in which they describe what they have experienced.³⁸ As Spencer and Flin state in their recent treatise, *The Evidence of Children[:] The Law and the Psychology*,³⁹ detailed descriptions of sexual encounters from young children, in the absence of other factors, should be seen as stemming from reality of past abuse rather than from their imagination. In fact, in the studies conducted on children who have been abused, it has been found that false denials and false retractions are much more common than false disclosures. In other words, these children are more likely not to report, or to under-report, the type and amount of abuse to which they have been subjected.⁴⁰

In a well-known study conducted in the 1980's, psychologists tested the theory that children tend to confuse imagined and real events and came to the conclusion that there was no validity to this proposition.⁴¹ The psychologists compared adults to children aged six to twelve years in a series of experiments. The subjects had their memories tested for photographs they had actually seen compared with the memories of pictures they had been asked to imagine. The results of the study indicated that the children, including the six year olds, were no more likely than the adults to confuse the seen with the imagined pictures.⁴²

In summary, social scientists have concluded that children are as capable as adults of discerning fact from fantasy, particularly in the context of witnessed events.

4. THE TRUSTWORTHINESS OF CHILDREN

There is no empirical research to support the theory that children are more likely than adults to lie. Children, as a class of witnesses, are no less

³⁷ Spencer and Flin, *supra*, note 1, at 259; and Johnson and Foley, *supra*, note 23, at 45.

³⁸ Spencer and Flin, *supra*, note 1, at 259; and Law Reform Commission of Western Australia, *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (April 1990), at 10. See, also, Robins J.A. in the Ontario Court of Appeal in *R. v. Khan* (1988), 64 C.R. (3d) 281, at 292, who states that young children "are generally not adept at reasoned reflection or of fabricating tales of sexual perversion. They manifestly are unlikely to use their reflection powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken".

³⁹ *Ibid.*

⁴⁰ *Ibid.*, and Law Reform Commission of Western Australia, *supra*, note 38.

⁴¹ Johnson and Foley, *supra*, note 23, at 45.

⁴² *Ibid.*

honest than adults and there is no evidence that children are more prone than adults to make false allegations.⁴³ On the contrary, psychiatrists and psychologists, as well as many individuals involved in the legal system such as judges, police, and social workers contend that young witnesses are often more truthful than their older counterparts.⁴⁴ A principal reason put forth for the truthfulness of the testimony of young children is that many young witnesses believe that the "judge will know if they lie and punish them, a level of faith in the legal process few adults would be likely to display".⁴⁵ As one Ontario judge observes, "my courtroom impression is that the average involved adult witness relates only convenient recollections at best".⁴⁶

Requisite knowledge plays an important role in assessing the truthfulness of children's statements. A child is more likely than an adult to lack the knowledge or cognitive ability to construct a believable false statement.⁴⁷ For example, as previously mentioned, young children typically know little about sexuality, and consequently are incapable of fabricating a detailed credible story of sexual abuse.⁴⁸

Therefore, modern studies confirm that there is no relationship between age and honesty. The testimony of a child is as trustworthy as the testimony furnished by an adult.⁴⁹

5. THE SUGGESTIBILITY OF CHILDREN

Suggestibility is defined as the degree to which the report of an observer changes after a witnessed event, to include information that was not present

⁴³ Foté, *supra*, note 2, at 158; D. Glaser and J.R. Spencer, "Sentencing, Children's Evidence and Children's Trauma", [1990] Criminal L. Rev. 371; Melton, *supra*, note 8, at 82; B. Nurcombe, "The Child as Witness: Competency and Credibility" (1986), 25 J. Am. Acad. Child Psychiatry 473, at 475; and Spencer and Flin, *supra*, note 1, at 270. See, also, *R. v. K.B.* (1990), 76 Alta L.R. (2d) 129, at 134 (Q.B.).

⁴⁴ Spencer and Flin, *supra*, note 1, at 270-71.

⁴⁵ J.R. Spencer and R. Flin, "Child witnesses - are they liars?" (1989), 139 New L.J. 1601.

⁴⁶ J.F. Bennett, "Children's Testimony in Sexual Abuse Cases", *The Journal* (April 1988) 14, at 15.

⁴⁷ G. Goodman, "The Child Witness: Conclusions and Future Directions for Research and Legal Practice" (1984), 40 J. Soc. Issues 157, at 165.

⁴⁸ *Ibid*; Yuille, King and MacDougall, *supra*, note 2, at 8; D. Whitcomb, E.R. Shapiro and L.D. Stellwagen, "When the Victim Is a Child: Issues for Judges and Prosecutors" (Washington, D.C.: U.S. Department of Justice, National Institute of Justice, August 1985); and Metropolitan Toronto Special Committee on Child Abuse, *Child Sexual Abuse Protocol[:]* Guidelines and Procedures for a Coordinated Response to Child Sexual Abuse in Metropolitan Toronto (2d ed.) (Toronto: June 1986), at 2.

⁴⁹ See authorities cited, *supra*, note 43.

during the event.⁵⁰ Alteration of a witness' report generally occurs through the introduction of new or conflicting information from a variety of sources, such as prodding by a third person for inferences about what occurred during the event, repeated questioning, or independent sources of "information".⁵¹

In "Suggestibility and the Child Witness", psychologists describe the traditional but erroneous view that children are particularly susceptible to confusions and distortions as a result of post-event influences and suggestions.⁵² This theory has been refuted by modern scientific data which demonstrates that all witnesses, regardless of age, are prone to suggestive influences.⁵³

Psychologist Elizabeth Loftus has been extremely influential in casting doubt on the unique suggestibility of child witnesses. In her experiments on adult subjects, she has demonstrated the great degree to which adults can be misled about incidents they observe.⁵⁴ In addition, empirical research has shown that children as young as four years old are remarkably resistant to suggestive questions about events that are non-trivial and personally significant to them.⁵⁵ Furthermore, studies comparing the susceptibility of adults and school-aged children to misinformation have not found that any clear correlation exists between age and suggestibility.⁵⁶ However, some psychologists are of the view that although pre-schoolers are clearly not more suggestible than adults for central aspects of an event, they may be more suggestible than adults for peripheral details.⁵⁷

Given the fact that most social scientists subscribe to the view that all witnesses, regardless of age, are prone to suggestive influences, the issue that must be addressed is, what measures can be taken to minimize distortions and contamination of reports of witnesses, and in particular child witnesses?

⁵⁰ S. Penrod, M.A. Bull and S. Lengnick, "Children as Observers and Witnesses: The Empirical Data" (1989), 23 Fam. L.Q. 411, at 422.

⁵¹ *Ibid*

⁵² M.A. King and J.C. Yuille, in S.J. Ceci, M.P. Toglia, D.F. Ross (eds.), *Children's Eyewitness Memory* (New York: Springer Verlag, 1987) 24.

⁵³ Davies, Flin and Baxter, *supra*, note 1, at 87; Foté, *supra*, note 2, at 158; Loftus and Davies, *supra*, note 23, at 3; and Lilles, *supra*, note 6, at 248-49.

⁵⁴ See Davies, Flin and Baxter, *supra*, note 1, at 88. See, also, Spencer and Flin, *supra*, note 1, at 253; and Lilles, *supra*, note 6, at 248-49.

⁵⁵ Goodman, Rudy, Bottoms and Aman, *supra*, note 15, at 2; and Goodman, Bottoms, Herscovici and Shaver, *supra*, note 15, at 5.

⁵⁶ Lilles, *supra*, note 6, at 249; and Spencer and Flin, *supra*, note 1, at 257.

⁵⁷ Mian, Haka-Iksee, Lefkowitz and McGoey, *supra*, note 26, at 6; J. McEwan, *supra*, note 3, at 813; and Christiansen, *supra*, note 2, at 709.

It has been said that the dynamics of the interview situation, the witness' understanding of it and the conduct of the interviewer, all have an impact on the degree of suggestibility of the person being interviewed.⁵⁸

An intimidating environment is responsible for increased suggestibility.⁵⁹ It has been found that young children are more resistant to suggestive questions in a less intimidating interview situation. In an experiment conducted by American psychologists, it was found that children who were interviewed in a comforting atmosphere answered questions more accurately and were more resistant to leading questions.⁶⁰ These child subjects were given positive reinforcement by the interviewer, they were smiled at frequently, and they were offered cookies and juice during the interview.

Particularly in the case of the child witness, the adult interviewer is a person in a position of authority.⁶¹ Many children think that their role is to provide the interviewer with the specific information that the interviewer seeks to obtain. Therefore, it is essential that the interviewer strive to conduct the interview in as neutral a manner as possible.⁶² It is imperative that the interviewer restrict the use of leading questions and present any suggestive information in a neutral fashion so that the child does not feel that agreement is the only appropriate response.⁶³ In addition, it ought to be conveyed to the child witness that the investigator or interviewer is only interested in what the child remembers and that admissions of memory failure and gaps are expected during the course of the interview.⁶⁴

In summary, research has established that children, like adults, are susceptible to suggestive influences but that the risk can be minimized by the use of sensitive questioning techniques in a supportive environment by a skilled interviewer.

⁵⁸ Yuille, King and MacDougall, *supra*, note 2, at 23; and Spencer and Flin, *supra*, note 1, at 254.

⁵⁹ Bottoms, Goodman, Rudy, Port, England, Aman and Wilson, *supra*, note 22, at 3; Goodman, *supra*, note 35, at 5; and Spencer and Flin, *supra*, note 1, at 256.

⁶⁰ Bottoms, Goodman, Rudy, Port, England, Aman and Wilson, *supra*, note 22, at 3; and Mian, Haka-Ikse, Lefkowitz and McGoe, *supra*, note 26, at 7.

⁶¹ Raskin and Yuille, *supra*, note 3, at 192; and Lilles, *supra*, note 6, at 249.

⁶² Raskin and Yuille, *ibid*.

⁶³ Spencer and Flin, *supra*, note 1, at 256; and Yuille, King and MacDougall, *supra*, note 2, at 23.

⁶⁴ King and Yuille, *supra*, note 52.

6. IMPORTANT ISSUES IN CHILD DEVELOPMENT RELEVANT TO THE TESTIMONIAL ABILITIES OF CHILDREN

Very young children may have difficulty in describing the chronology of events or the precise time at which an event occurred.⁶⁵ This is due to the fact that comprehension of time does not develop, on average, until a child reaches the age of ten years.⁶⁶ This problem is often overcome by simplifying time concepts or by linking them to familiar events (it happened after Halloween, it happened when we lived in the red house).⁶⁷ Although young children may not be able to conceptualize the exact number of times an event occurred or time an event by a calendar or a watch, most four to six year olds can distinguish between few and many, night and day, breakfast time and supper time.⁶⁸

Children, particularly pre-schoolers, may have greater difficulty than adults translating observations into purely verbal accounts.⁶⁹ In addition, children may be less able to communicate emotionally significant events by the use of language.⁷⁰ However, it has been found that young witnesses are often able to convey their experiences by the use of drawings or by re-enacting the events through toys or other people.⁷¹

Finally, young children may not be capable of making abstract references. For example, a young witness may not be able to describe a person's motivation for engaging in a particular activity.⁷²

7. CONCLUSION

The behavioural science research conducted in the past twenty years has demonstrated that the traditional views about the unreliability of children's evidence has no empirical support. Children, as a class of witnesses, do not have poorer memories than adults and they do not have greater difficulty

⁶⁵ Melton, *supra*, note 8, at 77; McAllister, *supra*, note 36, at 299-300; Mian, Haka-Ikse, Lefkowitz and McGoey, *supra*, note 26, at 4; Rozell, *supra*, note 8, at 822; Spencer and Flin, *supra*, note 1, at 241; Yates, *supra*, note 3, at 477; and Nurcombe, *supra*, note 43, at 476.

⁶⁶ McAllister, *supra*, note 36, at 299-300; and Nurcombe, *supra*, note 43, at 476.

⁶⁷ Mian, Haka-Ikse, Lefkowitz, McGoey, *supra*, note 26, at 4.

⁶⁸ Yates, *supra*, note 3, at 477.

⁶⁹ Rozell, *supra*, note 8, at 820; Yuille, King and MacDougall, *supra*, note 2, at 56.

⁷⁰ Mian, Haka-Ikse, Lefkowitz and McGoey, *supra*, note 26, at 3.

⁷¹ *Ibid.*

⁷² Nurcombe, *supra*, note 43, at 479.

distinguishing fact from fantasy in the context of witnessed events. Moreover, studies show that adult witnesses are susceptible to distortions as a result of suggestions and post-event influences in their description of particular events. Finally, modern research has demonstrated that there is no foundation to the statement that a relationship exists between age and honesty – the testimony of a child is as trustworthy as the evidence furnished by an adult witness.

CHAPTER 2

COMPETENCY RULES FOR FOR CHILD WITNESSES

I. INTRODUCTION

In this chapter, the Commission will examine the competency rules in Ontario in order to demonstrate the need for legislative reform. The rules embodied in section 18 of the *Ontario Evidence Act*¹ have been described as archaic, without rational foundation and an impediment to the administration of justice.² Many argue that the competency rules have made it extremely difficult for many children in this province to be qualified as witnesses with the result that a significant number of cases either do not reach the courts or collapse in the midst of trial.³

In addition, the new competency rules which the federal government introduced as Bill C-15 in 1988⁴ will be examined. In our view, the Ontario Legislature ought not to blindly adopt the provisions in Bill C-15 as have the provinces of British Columbia⁵ and Saskatchewan,⁶ as these provisions are fraught with problems. The Commission will also discuss the competency rules in jurisdictions which have been creative in their approach to the

¹ R.S.O. 1980, c. 145.

² See, for example, A.P. Nasmith, "The Inchoate Voice" (Toronto: 1990) (unpublished paper), at 36-37, 42-43; Canada, *Sexual Offences Against Children[:]* Report of the Commission on Sexual Offences Against Children and Youths (Chair: R.F. Badgley) (Ottawa: 1984), Vol. 1, at 30, 68-69, 71 [hereinafter referred to as the "Badgley Report"]; and N. Bala and J. Anweiler, "Allegations of Sexual Abuse in a Parental Custody Dispute: SmokeScreen or Fire?" (1987), 2 Can. Fam. L.Q. 343, at 360-62, 414; and submissions to the Ontario Law Reform Commission Project on *Child Witnesses*.

³ *Ibid.*, and C. Stewart and N. Bala, *Understanding Criminal Prosecutions for Child Sexual Abuse[:]* Bill C-15 and the Criminal Code (Toronto: Institute for the Prevention of Child Abuse, 1986), at 1.

⁴ S.C. 1987, c. 24, now R.S.C. 1985, c. 19 (3rd Supp.).

⁵ *Miscellaneous Statutes Amendment Act (No. 2)*, 1988, S.B.C. 1988, c. 46, s. 29, enacting s. 82 of the *Evidence Act*, R.S.B.C. 1979, c. 116.

⁶ *The Saskatchewan Evidence Amendment Act*, S.S. 1989-90, c. 57, s. 4, enacting ss. 42-42.3 of *The Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16.

reception of the testimony of children and whose legislative proposals reflect the current psychological literature on the reliability of evidence of young witnesses.

2. COMPETENCY REQUIREMENTS FOR CHILD WITNESSES IN ONTARIO CIVIL PROCEEDINGS

Until 1959, no statutory rules with regard to the competency of children existed in Ontario and as a result, it was the common law which determined which children could be qualified as witnesses.⁷ At common law, evidence could not be received from any individual unless it was given under oath.⁸ Since a common law presumption existed that children under fourteen years old were incompetent witnesses, the trial judge, in every case in which a young child was offered as a witness, was obliged to inquire into the child's understanding of the oath.⁹ Any child who could not demonstrate that he or she comprehended the nature of an oath was precluded from giving evidence at a trial in Ontario.

It was only in 1959 with the introduction of section 18 of the Ontario *Evidence Act*¹⁰ that a child who did not understand the oath could be qualified as a witness provided the child satisfied the test for unsworn testimony in section 18:

18.(1) In any legal proceeding where a child of tender years is offered as a witness and the child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of the child may be received though not given upon oath, if, in the opinion of the judge,

⁷ Section 18 of the Ontario *Evidence Act*, *supra*, note 1, was introduced in 1959 in *An Act to amend The Evidence Act*, S.O. 1959, c. 31, s. 1, which enacted s. 15a of *The Evidence Act*, R.S.O. 1950, c. 119.

⁸ *The King v. Brasier* (1779), 168 E.R. 202. See J.R. Spencer and R. Flin, *The Evidence of Children[: The Law and the Psychology]* (London, England: Blackstone Press, 1990), at 307; J.C. Robb and L.J. Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989), 27 *Alta. L. Rev.* 327, at 329-32; and A.F. Sheppard, *Evidence* (Toronto: Carswell, 1988), at 242.

⁹ *R. v. Antrobus* (1946), 3 C.R. 357, [1947] 2 D.L.R. 55 (B.C.C.A.) (subsequent references are to 3 C.R.); *R. v. Sankey*, [1927] S.C.R. 436, 48 C.C.C. 97; *R. v. Dyer* (1972), 17 C.R.N.S. 207, [1972] 2 W.W.R. 1 (B.C.C.A.) leave to appeal to S.C.C. refused 77 C.R.N.S. 233n (S.C.C.); Sheppard, *ibid.*; J. Sopinka and S.N. Lederman, *The Law of Evidence In Civil Cases* (Toronto: Butterworths, 1974), at 454; and J.C. Yuille, M.A. King and D. MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (Ottawa: Department of Justice Canada, 1988), at 34. See P. McWilliams, *Canadian Criminal Evidence* (3d ed.) (Aurora, Ont.: Canada Law Book, 1988), at 34-3.

¹⁰ *Supra*, note 1. See note 7, *supra*.

justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence unless it is corroborated by some other material evidence.

Since the promulgation of section 18, it is uncertain whether this provision sets forth the requirements only for the reception of the unsworn testimony of children or whether it also prescribes the rules governing the sworn testimony of children. A significant number of academics and judges are of the view that the statutory reforms introduced in section 18 deal only with the unsworn testimony of children.¹¹ They argue that it is the common law which specifies the requirements which must be met for a child to give sworn testimony. However, many courts, including the Ontario Court of Appeal,¹² regard section 18 of the *Evidence Act* as embodying the tests for both sworn and unsworn testimony.

(a) SWORN TESTIMONY

Until the *Bannerman* decision in 1966, *The King v. Brasier*¹³ was considered the leading common law case dealing with the admission of sworn testimony of a child witness. This English decision held that only in circumstances in which the judge is satisfied that the child has "sufficient knowledge of the nature and consequences of an oath"¹⁴ will a child be permitted to testify. The Court stressed that the age of the child was not determinative as to whether the child could be sworn as a witness.¹⁵ Rather, the admissibility of the evidence of children "depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be

¹¹ D.A.R. Thompson, "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings - Part I" (1988), 7 Can. J. Fam. L. 11, at 34. See, also, R.J. Delisle, *Evidence: Principles and Problems* (2d ed.) (Toronto: Carswell, 1989), at 119, and J.N. Pepper, "The Child Witness" (1983-84), 26 Crim. L.Q. 354, at 380-81.

¹² *R. v. Fletcher* (1982), 1 C.C.C. (3d) 370 (Ont. C.A.), leave to appeal to S.C.C. refused (1983), 48 N.R. 319 (S.C.C.); and *R. v. Budin* (1981), 32 O.R. (2d) 1, 58 C.C.C. (2d) 352 (Ont. C.A.) (subsequent references are to 56 C.C.C. (2d)). See, also, *R. v. Bannerman* (1966), 48 C.R. 110, 55 W.W.R. 257 (subsequent references are to 48 C.R.), aff'd without reasons by the Supreme Court of Canada, [1966] S.C.R. v, 50 C.R. 76n.

¹³ *Supra*, note 8.

¹⁴ *Ibid.*, at 202.

¹⁵ *Ibid.* Prior to *Brasier* a child under seven years could not be sworn as a witness. See G. Davies, R. Flin and J. Baxter, "The Child Witness" (1986), 25 Howard J. 81, at 82.

collected from their answers to questions propounded to them by the Court".¹⁶

In *R v. Antrobus*,¹⁷ a 1946 decision of the British Columbia Court of Appeal, the nature and consequences test in *Brasier* was cited with approval and further elaborated. In order for a child to give sworn testimony, the child must believe in the existence of God and must believe that God will punish her if she does not speak the truth. The Court stressed the importance of the oath as a prerequisite to the admissibility of evidence:¹⁸

An oath is a religious sanction ... a special test, or security against the fabrication of testimony.

The Court endorsed the common law presumption that while adults are presumed to be competent witnesses and to have the requisite degree of religious knowledge necessary for the swearing of the oath, there is a presumption that a child under fourteen years does not have such capacity.¹⁹

The stringent "nature and consequences" test in *Brasier* and *Antrobus*, referred to as the "oath and hell-fire competency test"²⁰ served as a substantial barrier to the admissibility of children's evidence. Children who did not understand the nature of an oath or who did not believe that they would suffer divine retribution if they told falsehoods, were precluded from being sworn as a witness.

In 1966, the landmark case of *R. v. Bannerman*²¹ was rendered by the Manitoba Court of Appeal. This decision constituted a radical departure from existing case law for two reasons. First, the Court held that section 16 of the *Canada Evidence Act*,²² which is identical to section 18 of the *Ontario Evidence Act*, sets out the test for the reception of sworn testimony, and is not solely addressed to the admissibility of unsworn evidence. Second, one of the prerequisites to the reception of sworn testimony of child witnesses set forth in *Brasier*²³ and *Antrobus*²⁴ was rejected — it was no longer necessary

¹⁶ *The King v. Brasier*, *supra*, note 8, at 203.

¹⁷ *Supra*, note 9.

¹⁸ *Ibid.*, at 359.

¹⁹ *Ibid.*, at 361-62.

²⁰ Spencer and Flin, *supra*, note 8.

²¹ *Supra*, note 12.

²² R.S.C. 1952, c. 307.

²³ *Supra*, note 8.

for a child to understand the spiritual consequences of lying to the court under oath. The sole criterion for the admissibility of the sworn evidence of a child was that the judge be satisfied that the child understood the nature of an oath. Dickson J.A., as he then was, stated that this meant that the child appreciated that he or she was assuming a moral obligation to speak the truth.²⁵

The *Bannerman* interpretation of the test for sworn testimony was based on the following reasoning. First, it was stated that the *Brasier*²⁶ decision had been consistently misinterpreted by the courts. In the words of Mr. Justice Dickson, the "consequences test" "is not reflected in the English authorities where recognition of the moral obligation of the oath appears to suffice".²⁷ Second, the Court emphasized that the term "consequences" is not present in section 16(1) of the *Canada Evidence Act* (section 18(1) of the *Ontario Evidence Act*). A final reason why the Court refused to endorse the "consequences test" was because no adult, let alone a child, can identify with certainty the spiritual consequences of lying under oath:²⁸

I doubt whether the greatest present day theologians or moralists have answered the question put to this thirteen year old boy with any degree of certainty or unanimity.

The Supreme Court of Canada in *Khan v. The Queen*,²⁹ *Reference re R. v. Truscott*,³⁰ and *Horsburgh v. The Queen*,³¹ has cited with approval the holding in *Bannerman*³² that a child need not have the ability to describe the religious consequences that may befall him if he does not speak the truth, in order to give sworn testimony.

The *Bannerman* decision is at the source of an important controversy. This controversy is attributable to the inconsistencies between the judgments of Dickson J.A. and Schultz J.A. with regard to whether a child must hold religious beliefs in order to swear an oath. According to Dickson J.A., in

²⁴ *Supra*, note 9.

²⁵ *R. v. Bannerman*, *supra*, note 12, at 138.

²⁶ *Supra*, note 8.

²⁷ *R. v. Bannerman*, *supra*, note 12, at 138.

²⁸ *Ibid.*, at 135, 138.

²⁹ [1990], 2 S.C.R. 531, at 538, 79 C.R. (3d) 1, at 7 (subsequent references are to 79 C.R. (3d)).

³⁰ [1967] S.C.R. 309, [1967] 2 C.C.C. 285.

³¹ [1967] S.C.R. 746, 63 D.L.R. (2d) 699.

³² *Supra*, note 12, at 138.

order for a child to give sworn testimony, the child need only satisfy the court that she understands that there is a moral obligation to speak the truth.³³ By contrast, Schultz J.A. held that the child must demonstrate that she believes that there is a "moral obligation, reinforced by some *religious belief*"³⁴ to tell the truth.

This ambivalence can also be found in the Ontario Court of Appeal decisions in *R. v. Budin*³⁵ and *R. v. Fletcher*.³⁶ In 1981, the Court held in *Budin* that in order to give sworn testimony, "a child must believe in God and know that an oath constitutes a declaration or promise to God to speak the truth".³⁷ In support of his position, Jessup J.A. cited the following dictionary definitions of an oath:³⁸

- (1) a solemn appeal to God (or to something sacred) in witness that a statement is true (*The Shorter Oxford English Dictionary*).
- (2) an appeal to God to witness the truth of a statement (*Jowitt's Dictionary of English Usage*).

One year after it rendered its judgment in *Budin*, the Ontario Court of Appeal reversed its position on the issue of whether a child must believe in God in order to be competent to take an oath. In *R. v. Fletcher*,³⁹ it held that a child need not have a belief in a deity in order to be sworn as a witness. The Court stated that Canada, like other jurisdictions, has been transformed from a religious to a largely secular society.⁴⁰ McKinnon A.C.J.O. also expressed the view that children ought to be treated in precisely the same manner as an adult with respect to their eligibility to swear an oath:⁴¹

Those adults to whom the sanctity of the oath has lost its religious meaning, none the less have a sense of moral obligation to tell the truth on taking the oath and feel their conscience bound by it. That is the nature of the oath for many adult witnesses today. Nor do they object on grounds of conscientious

³³ *Ibid.*

³⁴ *Ibid.*, at 120 (emphasis added).

³⁵ *Supra*, note 12.

³⁶ *Supra*, note 12.

³⁷ *R. v. Budin*, *supra*, note 12, at 356.

³⁸ *Ibid.*, at 355.

³⁹ *Supra*, note 12, at 376-77.

⁴⁰ *Ibid.*, at 377.

⁴¹ *Ibid.*

scruples to taking the oath. In my view, a child of tender years is in the same position as an adult witness when the determination is being made whether the child witness understands the nature of an oath.

The Court concurred with the dissenting opinion of Mr. Justice Brooke in *Budin*⁴² that although it may be helpful for a judge to inquire into the religious views of the child, belief in an Almighty is not a precondition to the swearing of an oath.⁴³

A problem which arises from the *Fletcher*⁴⁴ interpretation of the oath is what is the difference between sworn and unsworn testimony in section 18 of the Ontario *Evidence Act*? Section 18 clearly distinguishes between a child who understands the "nature of an oath" (who may give *sworn* testimony) and a child who merely "understands the duty of speaking the truth" (who may only give *unsworn* evidence). Unfortunately, the Supreme Court of Canada in the recent decision *Khan v. The Queen*⁴⁵ did not choose to resolve this dilemma which has persisted since 1966. With respect to *sworn* testimony, the Supreme Court held that "it must be established that the oath in some way gets a hold on [the child's] conscience" and that the child appreciates "the significance of testifying in court".⁴⁶ In order to give *unsworn* testimony, the Court stated that "the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct".⁴⁷ While McLachlin J. acknowledges that the tests for sworn and unsworn evidence are very similar, she nevertheless maintains that a difference exists between the two competency tests.⁴⁸

In the Commission's view, however, there is no longer a meaningful distinction between sworn and unsworn testimony in section 18 of the Ontario *Evidence Act*. In an attempt to avoid the corroboration requirement in the *Evidence Act* for the unsworn testimony of the child and to achieve equal treatment for adult and child witnesses, the courts have essentially collapsed the distinction between sworn and unsworn evidence and have rendered the two tests virtually indistinguishable. As one author states, since

⁴² *Supra*, note 12, at 360.

⁴³ *Fletcher*, *supra*, note 12, at 383. See A.P. Nasmith, "High Time For One Secular 'Oath'" (1990), 24 L.S.U.C. Gazette 230, at 234-35.

⁴⁴ *Supra*, note 12. See discussion by R. Bessner, "The Competency of the Child Witness: A Critical Analysis of Bill C-15" (1989), 31 Crim. L.Q. 481, at 490-91.

⁴⁵ *Supra*, note 29.

⁴⁶ *Ibid.*, at 7.

⁴⁷ *Ibid.*, citing *R. v. Bannerman*, *supra*, note 12, at 206.

⁴⁸ *Ibid.*

Bannerman, it is difficult to see how a child could fail the relaxed oath test yet satisfy the unsworn testimony test in section 18 of the Ontario *Evidence Act*.⁴⁹ The Badgley Report comes to the same conclusion:⁵⁰

The legal tests for the reception of children's evidence either upon oath (sworn) or not upon oath (unsworn) have become very close together in practice, notwithstanding that the corroboration requirements are completely different depending on whether the child gives sworn or unsworn evidence.

The problem becomes further complicated when one addresses the issue of whether a child who is not a member of a religious group or who lacks a religious education, can solemnly affirm pursuant to section 17 of the Ontario *Evidence Act*.⁵¹ This section provides:

17.(1) When a person objects to being sworn from conscientious scruples, or on the ground of his religious belief, or on the ground that the taking of an oath would have no binding effect on his conscience, he may, in lieu of taking an oath, make an affirmation or declaration that is of the same force and effect as if he had taken an oath in the usual form.

The Ontario Court of Appeal in *R. v. Budin*⁵² unanimously held that a child of tender years is not permitted to make a solemn affirmation in lieu of taking an oath. It stressed that section 18 of the Ontario *Evidence Act* solely contains the words "nature of an oath" and makes no reference to a solemn affirmation. As stated by Brooke J.A., the provision:⁵³

specifically deals with a child of tender years who is tendered as a witness. It makes no provision for the child to affirm nor does it involve consideration of conscientious scruples.

Yet it was Mr. Justice Brooke who held that the test for the sworn testimony of a child is that the child need only understand that she is under a moral obligation to tell the truth—it is not necessary to establish that the child believes in God or in a Supreme Being.⁵⁴

With respect, the Commission fails to understand the logic in this interpretation of section 18 of the *Evidence Act*. In our view, it is difficult to

⁴⁹ Thompson, *supra*, note 11, at 36

⁵⁰ Badgley Report, *supra*, note 2, at 67.

⁵¹ R.S.O. 1980, c. 145.

⁵² *Supra*, note 12, at 355.

⁵³ *Ibid.*, at 358.

⁵⁴ *Ibid.*, at 360.

discern any difference between a moral obligation to speak the truth (testimony under oath) and testimony given under solemn affirmation. *Black's Law Dictionary*⁵⁵ defines "affirmation":

A solemn and formal declaration or asseveration that an affidavit is true, that the witness will tell the truth ... this being substituted for an oath in certain cases.

A significant number of judges and academics are of the view that if the oath is to be interpreted as a moral obligation to tell the truth, "then any inherent distinction between an oath and an affirmation ceases to exist."⁵⁶

(b) UNSWORN TESTIMONY

Section 18(1) of the *Evidence Act* provides that a "child of tender years" who does not "understand the nature of an oath" may give unsworn testimony if the judge is of the opinion that "the child is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth".⁵⁷ Section 18(2) of the Act stipulates that "[n]o case shall be decided upon" the unsworn evidence of a child alone—such evidence "must be corroborated by some other material evidence".⁵⁸

Problems have plagued this provision of the *Evidence Act* since its inception. A much discussed issue is the meaning to be attributed to the term "child of tender years". Unfortunately, no statutory definition of this term is found in the Act. In their attempt to give content to these words, courts have relied upon the common law presumption that children under fourteen years are incompetent witnesses and have imputed to the term "child of tender years" a child under the age of fourteen. According to this interpretation, trial judges are required to conduct competency examinations of all child witnesses who have not reached fourteen years at the date of trial.⁵⁹

Although section 18 does not set a minimum age at which a child is competent to give evidence, courts have traditionally been reluctant to permit

⁵⁵ (5th ed.) (St. Paul, Minn.: West, 1979), at 55.

⁵⁶ Ontario Law Reform Commission, *Report on the Law of Evidence* (1976), at 127. See, also, Nasmith, *supra*, note 43, at 236; and McWilliams, *supra*, note 9, at 34-4.

⁵⁷ *Supra*, note 1.

⁵⁸ *Ibid.*

⁵⁹ Sopinka and Lederman, *supra*, note 9, at 454.

young children to testify.⁶⁰ It is hoped that the recent Supreme Court of Canada decision *Khan v. The Queen*⁶¹ will have the effect of altering the attitudes of many members of the judiciary respecting the ability of a young child to furnish evidence.

In *Khan*, the accused physician was charged with sexual assault of his three and one-half year old patient contrary to the *Criminal Code*.⁶² At trial, the judge held that although the child, who was four years eight months old, satisfied the requirements for unsworn testimony, the child was precluded from giving evidence solely because of her young age.

The Supreme Court of Canada held that the competency rules in section 16 of the *Canada Evidence Act*⁶³ do not distinguish between children of various ages and therefore, even very young children ought to be permitted to testify.⁶⁴ McLachlin J. stated that because the child satisfied the requirements for unsworn testimony—the child possessed sufficient intelligence for the reception of the evidence and she understood the duty to speak the truth—the child ought to have been allowed to testify about the alleged sexual assault. In the words of McLachlin J., if age were a “determinative consideration” as to whether a child was a competent witness, “there would be a danger that offences against very young children could never be prosecuted”.⁶⁵

These statements of the Supreme Court are of great significance. The evidence of a child may be crucial as the child may have been the sole witness to the particular event that is the subject of the legal proceedings. The Supreme Court in *Khan* has clearly adopted the conclusion of modern

⁶⁰ See, for example, the decision of Locke D.C.J. in the Ontario District Court in *R. v. Khan*, June 6, 1986 (Doc. No. P-2012/85), rev'd (1988), 27 O.A.C. 142, 64 C.R. 281, aff'd *supra*, note 29. See, also, N. Bala, “Bill C-15: New Protections For Children - New Challenges for Professionals” (Toronto: Institute for the Prevention of Child Abuse, October 1988), at 4.

⁶¹ *Supra*, note 29.

⁶² R.S.C. 1970, c. C-34, s. 246.1, now R.S.C. 1985, c. C-46, s. 271.

⁶³ R.S.C. 1970, c. E-10.

⁶⁴ *Supra*, note 29, at 7.

⁶⁵ *Ibid.*, at 8. For a similar view, see the Badgley Report, *supra*, note 2, at 67, which states: “To make a child’s testimonial competency contingent upon or influenced by the child’s age fails to take into account the cognitive and developmental differences among children of the same age”.

psychological studies that the evidence of a young child may have significant probative value.⁶⁶

Another unresolved matter in the interpretation of section 18 of the Ontario *Evidence Act* is, who is to conduct the competency examination mandated by the provision? In particular, is counsel permitted to pose questions to the child for the purpose of assisting the court in its assessment of the competency of the child? It was held in *R. v. Jing Foo*⁶⁷ that it is not necessary for the judge to personally examine the child; rather it is permissible for counsel to ask questions to enable the court to make a determination as to whether the child is a competent witness. In the *Bannerman* case,⁶⁸ the prosecution, defence counsel, as well as the trial judge questioned the children in order to ascertain whether they ought to be allowed to give evidence. Although Schultz J.A. stated that the trial judge is the only appropriate person to ask the child questions on a competency examination,⁶⁹ Dickson J.A. did not comment on the procedure which had been followed at trial. However, in *R. v. Budin*,⁷⁰ the Ontario Court of Appeal stated in unequivocal language that the trial judge, not counsel, is to pose questions to the child in the competency assessment prescribed by the *Evidence Act*.

The foregoing discussion demonstrates that the competency rules for child witnesses in Ontario are in substantial need of clarity and reform. The Commission shall now examine the new federal competency provisions which were introduced into the *Canada Evidence Act* in 1988.

3. THE 1988 AMENDMENTS TO THE CANADA EVIDENCE ACT

In 1988, Bill C-15, entitled *An Act to Amend the Criminal Code and the Canada Evidence Act*,⁷¹ was proclaimed in force. The new legislation repealed section 16 of the *Canada Evidence Act*,⁷² which is identical to

⁶⁶ *Supra*, note 29. See R. Bessner, "Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15.

⁶⁷ (1939), 54 B.C.R. 202, 73 C.C.C. 103, at 105 (Co. Ct.).

⁶⁸ *Supra*, note 12.

⁶⁹ *Ibid.*, at 120.

⁷⁰ *Supra*, note 12, at 356. See, also, *R. v. Salmon* (1972), 10 C.C.C. (2d) 184 (Ont. C.A.); and *R. v. Leggeu* (1986), 75 N.S.R. (2d) 373 (S.C. App. Div.).

⁷¹ *Supra*, note 4.

⁷² R.S.C. 1970, c. E-10.

section 18 of the Ontario *Evidence Act*, and substituted the following provision:⁷³

16.(1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine.

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

Although section 16 constitutes a significant improvement over the predecessor section, the new federal competency rules for children contain several problems. Indeed, many of the difficulties which were present in the old legislation have not, in our view, been resolved by Bill C-15.

Section 16 clearly deals with both the sworn and unsworn testimony of children.⁷⁴ Therefore, the debate as to whether the provision sets out the competency requirements for sworn evidence as well as the unsworn evidence of a child, has finally been resolved.

⁷³ *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 16, rep. and sub. R.S.C. 1985, c. 19 (3rd Supp.), s. 18.

⁷⁴ M. Rosenberg, "Recent Developments in Evidence" (Canadian Bar Association - Ontario, 1990 Institute of Continuing Legal Education, Criminal Law), at 21; and Thompson, *supra*, note 11, at 38.

Another positive feature of the 1988 federal amendments is that the term "child of tender years" has been omitted from the new legislation. Section 16 applies to cases in which "a proposed witness is a person under fourteen years of age". Fourteen years was likely selected as the appropriate age on the basis of the common law principle that a child of fourteen is presumed to understand the nature of an oath.⁷⁵ As the Ontario Court of Appeal states in *R. v. Frank K.*,⁷⁶ the question of whether a particular child is of "tender years" is no longer left to the discretion of the court. Thus, the courts need no longer struggle with the meaning of "child of tender years" and it is now clear that only children under the age of fourteen must undergo competency examinations.

Section 16(1) makes it clear that it is the judge, and not counsel, who is to conduct the inquiry as to whether the child has the capacity to testify. Therefore, the questions posed by counsel in *Bannerman*⁷⁷ and *Jing Foo*⁷⁸ are prohibited under the new legislation. Also, in view of the mandatory language in section 16(1), a judicial inquiry is required on every occasion in which a child under fourteen is offered as a witness.⁷⁹

Section 16(1) of the *Canada Evidence Act* stipulates that before a child is permitted to give evidence, the judge must determine whether the child: (a) understands the nature of an oath or solemn affirmation; and (b) is able to communicate the evidence.

The legislators have clearly endorsed the view that a child should be permitted to affirm. As previously mentioned, decisions such as the Ontario Court of Appeal in *Budin*⁸⁰ held that the former section 16 of the *Canada Evidence Act* did not allow a child to make a solemn affirmation in lieu of an oath. As a result, a young person, like an adult, need no longer convince the court that he holds a belief in God in order to offer sworn testimony.

The second prerequisite in section 16(1) is that it must be demonstrated to the satisfaction of the court that the child has the ability to communicate

⁷⁵ *Besner*, *supra*, note 44, at 495-96; and *Robb and Kordyban*, *supra*, note 8, at 333. Section 16(5) states that fourteen years is the age of presumptive capacity. If the witness is fourteen years or older, the party objecting must establish that there is an issue as to the capacity of the proposed witness to testify.

⁷⁶ (1990), 73 O.R. (2d) 480 (Ont. C.A.), at 482.

⁷⁷ *Supra*, note 12.

⁷⁸ *Supra*, note 67.

⁷⁹ *Supra*, note 73.

⁸⁰ *Supra*, note 12. See text accompanying note 52, *supra*.

the evidence. Presumably, this means that the child must have the capacity to comprehend the questions posed to him and to respond in a manner that is comprehensible to the trier of fact.

What are the difficulties presented by the new federal legislation? Given the modern interpretation of the oath⁸¹ as a moral obligation to tell the truth which does not require a belief in God, one must ask what the difference is between an oath and a solemn affirmation in section 16(1) of the Act. Many writers have criticized these provisions as being devoid of any meaningful distinction.⁸² In other words, the uncertainty which was present in the predecessor section of the *Canada Evidence Act* and which currently exists in Ontario civil proceedings has not been resolved.

Section 16(3) of the new legislation states that a child who does not understand the nature of an oath or solemn affirmation but who has the ability to communicate the evidence may be permitted to testify on "promising to tell the truth". This provision is fraught with difficulties. Bill C-15 fails to resolve the uncertainty in the former section 16 of the *Canada Evidence Act* between sworn (oath/solemn affirmation) and unsworn testimony. Is not making a solemn affirmation tantamount to "promising to tell the truth"? As Mr. Justice Dickschneider states in *R. v. Meacham*:⁸³

[T]here is no substantive difference between an oath, an affirmation and a promise [to tell the truth]. Each one of the three imposes upon the conscience of the person giving the evidence a moral obligation to tell the truth.

Moreover, there is an inconsistency between section 16(2) and section 16(3) of the new provision. Section 16(2) states that if a child understands the nature of a solemn affirmation and is able to communicate the evidence, the child "shall" testify. Section 16(3) provides that in circumstances in which the child promises to tell the truth and is able to communicate the evidence, the court "may" permit the child to testify. Section 16(2) is a mandatory provision while section 16(3) is permissive.

⁸¹ See, for example, *R. v. Banveman*, *supra*, note 12, and *R. v. Fischer*, *supra*, note 12. See, also, *Khan v. The Queen*, *supra*, note 29.

⁸² See, for example, Nazmith, *supra*, note 43, at 236.

⁸³ (1989), 82 Sask. R. 84, at 86 (Q.B.). See, also, *R.R.D. v. R.* (1989), 69 C.R. (3d) 267, at 274 (Sask. C.A.).

Obviously, the Legislature intended section 16(2) and section 16(3) to address different circumstances. It is difficult, however, to identify any meaningful difference between the provisions.⁸⁴

This is further exacerbated by the fact that section 16 of the *Canada Evidence Act* no longer requires that the unsworn evidence of a child be corroborated. The repeal of the corroboration rule has been enthusiastically received by academics, practising lawyers and members of the judiciary.⁸⁵ As many observers state, since no legal consequences now flow from whether a child gives sworn (oath/solemn affirmation) or unsworn (promise to tell the truth) evidence, there seems little point in compelling the court to make the inquiry mandated by section 16(1) and section 16(3) of the Act.⁸⁶

In summary, the new competency rules introduced by Bill C-15 constitute a substantial improvement over the predecessor provision in the *Canada Evidence Act*. The new section 16 explicitly permits a child to testify under solemn affirmation, it abolishes the corroboration rule for the unsworn testimony of a child, and it stipulates that it is solely the judge and not counsel, who is to pose questions to the child on a competency examination.

Nevertheless, the new provision of the *Canada Evidence Act* is not without its difficulties. Section 16 fails to resolve many of the problems which plagued the predecessor provision. There does not appear, for example, to be a meaningful distinction between the tests for sworn testimony in section 16(1) and unsworn testimony in section 16(3). In addition, given the modern interpretation of the oath in *Bannerman*, *Fletcher* and *Khan*, it is difficult to discern a difference between the oath as a moral obligation to speak the truth and a solemn affirmation. Finally, section 16 has been criticized for making the law needlessly complicated. As an Ontario judge states in his critique of Bill C-15:⁸⁷

[the] amendments... to the *Canada Evidence Act*, rather than taking the unifying step for all witnesses, gave us an intriguing new hierarchy of choices for witnesses under fourteen ...

⁸⁴ Desautel, *supra*, note 44, at 498-99; Rosenberg, *supra*, note 74; and Bala, *supra*, note 60, at 8.

⁸⁵ *G.R. v. The Queen*, [1990] 2 S.C.R. 30, at 53, 77 C.R. (3d) 347, at 369; Rosenberg, *supra*, note 74, at 20; N. Bala, "Antiquated Evidence Rules Must Not Shackle Courts", *The National* (October 1987), at 14.

⁸⁶ See Spencer and Flia, *supra*, note 8, at 308.

⁸⁷ Naamith, *supra*, note 43, at 237-38.

It seems that we now have three choices: an oath, a solemn affirmation and a third choice for a person who understands neither the nature of an oath nor a solemn affirmation but who can communicate. Such people may simply promise to tell the truth. Now that there are no longer any requirements for corroboration of unsworn evidence, is there nonetheless to be a different weight attached to the evidence of people depending on which of these alternatives is used? Will that not be very confusing? We know that a solemn affirmation is equated with an oath. What then is the quality of evidence given with a simple promise? Is it something less? If not, why not use a simple promise for everyone? If there is a difference, what is the difference exactly? What is the consequence if the simple promise is taken in the first instance without an exploration of the other alternatives?

As previously mentioned, Saskatchewan⁸⁸ and British Columbia⁸⁹ are the only provinces to date which have reformed the competency rules for child witnesses. The British Columbia legislation which was introduced in 1988, and *The Saskatchewan Evidence Act* which was amended in 1989, simply imported the new federal competency rules in Bill C-15.⁹⁰

4. REFORM OF THE CHILD COMPETENCY RULES IN ONTARIO

(a) SHOULD THE OATH BE RETAINED AS A TEST OF COMPETENCY?

Over past few years, the oath as a test of competency has been severely criticized by members of the legal community, as well as by social scientists.⁹¹ The traditional oath ceremony has been referred to as "archaic", "preferential", of "very little utility" and "not a valid indicator of a witness' competence".⁹² As previously discussed, the oath requirement for the sworn testimony of children in Ontario has been so unsuitable that the courts have whittled down its meaning so that it is virtually indistinguishable from the test

⁸⁸ *Supra*, note 6, s. 5.

⁸⁹ *Supra*, note 5, s. 42.

⁹⁰ With the exception of the word "shall" in s. 42(3) of the Saskatchewan Act, *supra*, note 6 (which is s. 16(3) of the *Canada Evidence Act*, *supra*, note 72), the Saskatchewan competency rules for child witnesses are identical to the federal rules.

⁹¹ Law Reform Commission of Western Australia, *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Perth, Australia: April 1990), at 8; Law Reform Commission of Ireland, *Report On Child Sexual Abuse* (September 1990), at 55; H. Lilles, "Children as Witnesses: Some Legal and Psychological Viewpoints" (1986), 5 Can. J. Fam. L. 237, at 251; Spencer and Flin, *supra*, note 8, at 273-76; and Yuille, King and MacDougall, *supra*, note 9, at 53; and Law Reform Commission of Canada, *Report on Evidence* (Ottawa: Information Canada, 1975).

⁹² See, for example, Nasmith, *supra*, note 43, at 232.

for unsworn evidence. Many in the legal field have advocated that the oath be abolished as a test of competency for all witnesses.⁹³

The purported purpose of having a person testify under oath is to increase the likelihood that the witness will speak the truth in court. However, social scientists have concluded in their studies of young witnesses that understanding the oath is "irrelevant"⁹⁴ to whether a child will speak the truth in court proceedings.

It is also argued that the oath is a test of religious understanding rather than a test of the ability of a child to accurately recount past events in response to questions.⁹⁵ A strict interpretation of an oath connotes an understanding of religious ideas. *Webster's Dictionary*⁹⁶ defines "oath" as:

a solemn formal calling upon God or a god to witness to the truth of what one says....

A study recently conducted in Ontario on the extent of a child's understanding of the duty to speak the truth in court, found that children do not believe a difference exists between swearing to tell the truth and promising to tell the truth.⁹⁷ As the Western Australia Law Reform Commission states, the oath "is not a test which a very young child, however, intelligent and truthful, may be expected to pass".⁹⁸ The effect of the oath requirement is that it precludes child witnesses from offering sworn testimony. According to the Law Reform Commission of Ireland:⁹⁹

The real objection to the oath, however, is that it presents an irrational and irrelevant obstacle to the giving of evidence by children in cases where they have valuable and relevant evidence to provide.

Furthermore, as an Ontario judge states in his criticism of the oath, besides "being unnecessarily intrusive, it is a waste of time for judges to be

⁹³ *Ibid.*, at 239; and Law Reform Commission of Ireland, *supra*, note 91, at 44.

⁹⁴ Yuille, King and MacDougall, *supra*, note 9.

⁹⁵ See Law Reform Commissioner of Tasmania, *Child Witnesses* (1989), dissenting opinion, Annex "B".

⁹⁶ *Webster's Third International Dictionary* (Springfield, Mass.: Merriam-Webster, 1986), at 1554.

⁹⁷ M.D. Ruck, *Children's Understanding of Telling The Truth In Court* (University of Toronto, Master of Arts Thesis, 1989), at 41.

⁹⁸ *Supra*, note 91, at 8. Note that this was a discussion paper.

⁹⁹ *Supra*, note 91, at 55.

investigating the religious beliefs of potential witnesses and to pretend to come out of these token excursions with any enlightenment".¹⁰⁰

Another reason put forth for the abolition of the oath is that this competency test cannot be satisfied by a child witness who has not had religious instruction. Many judges have acknowledged that as society has become more secular, there has been a significant decline in religious training for children and adults alike. Judge Nasmith, in a persuasive article entitled "High Time for One Secular 'Oath'"¹⁰¹ has argued that it is time for the courts in Ontario to become entirely secular and to be transformed from "the private preserve of Anglican Christians".¹⁰²

In my opinion, our courts should be entirely secular. We live in an increasingly multi-culture (multi-religion) society. Religious beliefs are diverse. Those people linked to the Judeo-Christian mainstream would find the traditional Anglican ceremony more or less familiar. Many others would not. We took this country from aboriginals who had other beliefs. We have invited and welcomed to the country very significant numbers of Muslims, Hindus, Buddhists, etc. to add to a list of agnostics, atheists, pantheists, and myriad others who have not been indoctrinated with Christian beliefs. The rights of these minorities (who, together, possibly constitute the majority) to be free from discrimination based on religion, are firmly entrenched in section 15 of our Charter of Rights. I think this means that our democratic society is sufficiently liberalized to free individuals from any tendency of the state to use its power to impose religious dogma on them.

Judge Nasmith recommends that the oath be abolished in favour of a simple promise to tell the truth, not only for children but also for adult witnesses.¹⁰³

It is also important to note that the Ontario Law Reform Commission in its *Report on the Law of Evidence*¹⁰⁴ denounced the oath as a test of competency. The Commission took the position that the oath has discriminatory aspects rooted in religious beliefs that are unacceptable in a pluralistic society.¹⁰⁵

¹⁰⁰ Nasmith, *supra*, note 43, at 233.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*, at 233.

¹⁰³ *Ibid.*

¹⁰⁴ *Supra*, note 56, at 129.

¹⁰⁵ See, also, P. Todd, "Ontario rethinks Bibles in court", *The Toronto Star* (May 15, 1991).

The oath as a requirement of a child's competency has been abandoned in some jurisdictions. In many U.S. states, children, like adults, need only understand the obligation to tell the truth and be capable of expressing themselves in order to be qualified as a witness.¹⁰⁶ Likewise, the Victoria Law Reform Commission in its report *Sexual Offences Against Children*¹⁰⁷ recommends that a child should be competent to give evidence if she understands that she is under an obligation to speak the truth and if she is able to give a rational reply to questions about facts in issue.

In addition, the Pigot Report in England recommended the abolition of the oath for children.¹⁰⁸ The Law Reform Commission of Ireland which proposed that the oath be abolished for all witnesses, stated that the oath no longer represents an objective and rational instrument of investigation in the hands of the court.¹⁰⁹

The Commission recommends that the oath be abolished for child witnesses in civil proceedings. A review of the case law demonstrates that the oath has become an unworkable test of competency for children and has impeded many young witnesses from offering crucial evidence at trials. Moreover, studies indicate there is no correlation between understanding the meaning of the oath and speaking the truth in court.¹¹⁰ Furthermore, the transformation of Ontario, like other jurisdictions, from a religious to a largely secular society has accentuated the inappropriateness of the oath as a test of competency. The Commission therefore recommends that the oath be abolished as a test of competency for child witnesses. In our view, a simple promise to tell the truth should be the competency requirement for child witnesses in Ontario civil proceedings.

¹⁰⁶ See, for example, D.J. Foté, "Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform" (1985), 13 *Pepperdine L. Rev.* 157, at 164; and *Kan. Stat. Ann.* 60-417 (1983); *Mont. R. Evid.* 601; *N.J. R. Evid.* 17; and *N.J. Rev. Stat.* 2A-81-1 (1976), *N.C. Gen. Stat.* 8C-1, R. 601; *Vt. R. Evid.* 601. A discussion of Maine's competency rules is found in K.V. Lipez, "The Child Witness in Sexual Abuse Cases in Maine: Presentation, Impeachment, and Controversy" (1990), 42 *Me. L. Rev.* 283.

¹⁰⁷ (November 1988).

¹⁰⁸ J. McEwan, "In the Box or on the Box? The Pigot Report and Child Witnesses", [1990] *Crim. L. Rev.* 363, at 367. See discussion in the Law Reform Commission of Ireland, *supra*, note 91, at 52-54.

¹⁰⁹ Law Reform Commission of Ireland, *ibid.*, at 55.

¹¹⁰ Yuille, King and MacDougall, *supra*, note 9.

(b) THE PRESUMPTION THAT CHILDREN ARE INCOMPETENT WITNESSES

A major reform adopted in some jurisdictions and advocated by several law reform bodies is the abolition of the common law presumption that children under fourteen years are incompetent witnesses. In Queensland, Australia,¹¹¹ as well as in the United States at both the state and federal levels,¹¹² children are accorded the same rebuttable presumption of competency granted to all other witnesses. Rule 601 of the United States Federal Rules of Evidence provides:¹¹³

Every person is competent to be a witness except as otherwise provided by these rules.

The rules provide that a witness will be prevented from testifying if he is incapable of expressing himself or if he is unable to understand the duty to speak the truth.¹¹⁴ It is stated that Rule 601 reflects the modern trend to eliminate rules that disqualify witnesses from giving evidence solely because they belong to a particular group, such as children. Matters which were formerly considered by the judge as relevant to a threshold determination of a child's competency instead are examined by the court in its determination of the child's credibility.¹¹⁵ As Bulkley states:¹¹⁶

Under Rule 601 any deficiencies in a child's testimony relating to memory or narration abilities no longer are part of the determination of a child's competency, but as with adults, are left to the jury to decide the weight and credibility of the testimony.

¹¹¹ See discussion in Law Reform Commission of Western Australia, *supra*, note 91, at 32.

¹¹² American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* (Washington, D.C.: 1985), at 19-20; and J.A. Bulkley, "The Impact of New Child Witness Research on Sexual Abuse Prosecutions" in S.J. Ceci, D.F. Ross and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989) 208, at 210. See discussion of Montana Rules of Evidence in M. McGrath and C. Clemens, "The Child Victim as a Witness in Sexual Abuse Cases" (1985), 46 U. Mont. L. Rev. 229, at 231.

¹¹³ Public Law 93-595; 88 Stat. 1926 [H.R. 5463]. More than half the states have adopted the rebuttable presumption of competency in r. 601. See, for example, Maine and Wisconsin.

¹¹⁴ Bulkley, *supra*, note 112, at 210; and Spencer and Flin, *supra*, note 8, at 307.

¹¹⁵ Bulkley, *supra*, note 112.

¹¹⁶ *Ibid.*, at 211-12.

The Scottish Law Commission,¹¹⁷ the Law Reform Commission of Ireland,¹¹⁸ as well as the Badgley Report,¹¹⁹ have proposed that children be presumed to be competent witnesses.

The Ontario Law Reform Commission recommends that the presumption that a child under fourteen years is an incompetent witness should be abolished. Accordingly, we propose that the Ontario *Evidence Act* be amended to provide that all individuals, including children, be presumed competent witnesses. Although the Commission takes the position that the presumption can be rebutted if the individual fails to satisfy the competency requirements, we believe that this change of emphasis is important as it reflects the view in the scientific literature that children are as reliable witnesses as adults. The Commission is of the opinion that this recommendation, if adopted, will have a positive impact on the number of children who are qualified as witnesses.

(c) THE DISTINCTION BETWEEN SWORN AND UNSWORN TESTIMONY FOR CHILD WITNESSES

The Commission endorses the reform of abolishing the distinction between sworn and unsworn testimony which has been introduced in several legal systems. These jurisdictions have taken this position for three principal reasons. First, judicial interpretation of sworn and unsworn testimony have rendered the two tests virtually indistinguishable.¹²⁰ Second, since many jurisdictions have abolished the corroboration requirement for the unsworn evidence of a child:¹²¹

[t]here seems little point in requiring the court to decide whether to put a child on oath or not if in the end the child's evidence is entitled to the same amount of weight, whether sworn or unsworn.

A third reason for collapsing the distinction between sworn and unsworn evidence of children is to eliminate the possibility that the trier of fact will draw an adverse inference about the value of the evidence from whether it

¹¹⁷ *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Edinburgh, Scotland: 1990), at 11.

¹¹⁸ *Supra*, note 91, at 55.

¹¹⁹ *Supra*, note 2, at 68. See, also, Law Reform Commission of Canada, *supra*, note 91.

¹²⁰ See *supra* discussion in s. 2(a) and 2(b).

¹²¹ Spencer and Flin, *supra*, note 8, at 309.

was sworn or unsworn.¹²² For the above-mentioned reasons, the Commission takes the position that the Legislature should abolish the distinction between sworn and unsworn testimony for child witnesses in Ontario.

(d) COMPETENCY EXAMINATIONS FOR CHILD WITNESSES

There has been a movement in several countries toward the abolition of competency tests for children. It is stated that children of any age ought to be permitted to testify and that the trier of fact will assess the credibility of the witness and the weight to be accorded to the evidence. For instance, the Badgley Committee makes the following recommendations:¹²³

1. Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of admissibility.
2. A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying.

The 1988 New Zealand Geddis Report also came to the conclusion that the competency test serves no useful function and should be abandoned.¹²⁴ Similarly, the Pigot Report in England recommended that no preliminary assessment be done by the court as to whether a child qualifies as a witness.¹²⁵ Instead, the judge has the power to disqualify any witness when she begins to testify if she is incoherent, unable to communicate in a manner that is comprehensible, or if she is of unsound mind. The Pigot Committee is of the view that if the child is available to testify, she should be heard — the intellectual development, age, and maturity of the witness should solely be a matter of weight.¹²⁶ This is precisely the situation in France, West Germany, and Scandinavia.¹²⁷ In those countries, there is no preliminary competency examination for children. The age and maturity of the witness may affect the weight that is placed on the evidence but there is no question

¹²² Law Reform Commission of Western Australia, *supra*, note 91, at 34.

¹²³ *Supra*, note 2, at 68.

¹²⁴ See discussion in Law Reform Commissioner of Tasmania, *supra*, note 95, and in Spencer and Flin, *supra*, note 8, at 310.

¹²⁵ McEwan, *supra*, note 108.

¹²⁶ *Ibid.*

¹²⁷ Spencer and Flin, *supra*, note 8, at 309-11.

of the court refusing to listen to children below a certain age or level of understanding.¹²⁸

Why are so many law reformers urging that competency assessments of children be dispensed with? Many argue that competency assessments are poor indicators of the reliability of the testimony offered by the child witness.¹²⁹ Furthermore, although young children appreciate the difference between truthfulness and lying, they have difficulty, as do most adults, articulating a definition of truth. Another reason put forward for the abolition of competency assessments is that moral knowledge is not helpful in predicting a child's truthfulness.¹³⁰ An avowed purpose of a competency assessment is for the court to ascertain whether a child is likely to furnish honest testimony. Yet many argue that it is discriminatory to subject young children to such scrutiny when no rules exist to assess the morality of adult witnesses prior to admitting their evidence.¹³¹

The Commission takes the position that no special competency examinations should be required of child witnesses. Providing the child promises to tell the truth, which is the competency requirement proposed by this Commission, the child ought to be permitted to give evidence. The Commission further proposes that in the small number of cases in which the judge is of the opinion that the child does not understand the promise to tell the truth (due to, for example, the extreme youth of the child), the judge shall nevertheless hear the evidence and may act on it, if, at the end of the case, he or she is satisfied that the evidence is reliable.

¹²⁸ *Ibid.*, at 62.

¹²⁹ *Ibid.*, note 8, at 276; Yuille, King and MacDougall, *supra*, note 9, at 1-2. See, also, D. Whitcomb, E.R. Shapiro and L.D. Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* (Washington, D.C.: U.S. Department of Justice, National Institute of Justice, August 1985), at 38.

In an experiment conducted by psychologists on three to six-year-old subjects, the children were asked a number of questions typically asked by judges in a competency examination. It was found that the children's performance on those questions were poor indicators of their ability to provide accurate information about the event they had experienced.

¹³⁰ Spencer and Flin, *supra*, note 8, at 275.

¹³¹ *Ibid.*

(e) THE CORROBORATION REQUIREMENT FOR THE UNSWORN TESTIMONY OF A CHILD

The requirement in section 18(2) of the Ontario *Evidence Act* that no case shall be decided upon the unsworn evidence of a child "unless it is corroborated by some other material evidence"¹³² has undergone substantial criticism. Scientific research indicates that the assumptions on which the corroboration rule is based lack empirical support.¹³³ The corroboration rule is based on the erroneous view that children are unreliable witnesses either because they have a greater propensity than adults to lie or because their memory is inferior to that of adult witnesses. As demonstrated in chapter 1, there is no validity to these propositions.

It is also argued that it is irrational to have rigid rules which attempt to evaluate a witness' testimony depending on whether the witness falls within a particular class.¹³⁴ Psychologist John Yuille, who describes the corroboration rules as "arbitrary", "inflexible", and in need of repeal, states that it is discriminatory to have such rules for the evidence of children and not for testimony furnished by adult witnesses.¹³⁵

Another important reason for the repeal of section 18(2) of the Ontario *Evidence Act* is that there is often no direct evidence, either eyewitness or physical/medical, to corroborate the child's testimony. For example, it is frequently difficult to obtain corroborating evidence of the sexual abuse of a child, as independent witnesses are rare and physical signs of the abuse are often absent. As Rozell states, although the corroboration rules may sometimes prevent the admission of inaccurate testimony, there is a greater probability that those rules prevent the admission of highly reliable and relevant evidence.¹³⁶

There has been a strong movement in many jurisdictions toward the abolition of special corroboration requirements for children's evidence. Most

¹³² *Supra*, note 1.

¹³³ S. Rozell, "Are Children Competent Witnesses?: A Psychological Perspective" (1985), 63 Wash. U.L.Q. 815, at 829; M.R. Leippe, J.C. Brigham, C. Cousins and A. Romanczyk, "The Opinions and Practices of Criminal Attorneys Regarding Child Eyewitnesses: A Survey" in S.J. Ceci, D.F. Ross and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989) 100; Law Reform Commission of Western Australia, *supra*, note 91, at 19; Law Reform Commission of Ireland, *supra*, note 91; at 57; and Badgley Report, *supra*, note 2, at 69.

¹³⁴ See Law Reform Commissioner of Tasmania, dissent, *supra*, note 95.

¹³⁵ Yuille, King and MacDougall, *supra*, note 9, at 42.

¹³⁶ Rozell, *supra*, note 133.

U.S. states repealed the corroboration requirements for children in the 1970's.¹³⁷ In the 1988 amendments to the *Canada Evidence Act*, Parliament repealed the corroboration rule in section 16(2).¹³⁸ Nor do such rules exist in the criminal law of England.¹³⁹ Moreover, the Law Reform Commissions in Ireland,¹⁴⁰ Western Australia¹⁴¹ and Victoria,¹⁴² have urged their respective Legislatures to repeal this "archaic" and "irrational" rule.

The Ontario Law Reform Commission takes the position that the corroboration rule in section 18(2) of the *Ontario Evidence Act* for the unsworn testimony of the child should be repealed. This rule is based upon erroneous views respecting the evidence of children. Furthermore, in many cases, it is impossible to obtain corroborating evidence and as a result, this rule is often responsible for preventing the trier of fact from considering what may be highly probative evidence in its deliberations.

¹³⁷ Spencer and Flin, *supra*, note 8, at 173; and Leippe, Brigham, Cousins and Romanczyk, *supra*, note 133.

¹³⁸ *Supra*, note 4, s. 18.

¹³⁹ *Ibid.*

¹⁴⁰ *Supra*, note 91, at 57.

¹⁴¹ *Supra*, note 91, at 10.

¹⁴² *Supra*, note 107.

CHAPTER 3

THE KENDALL RULE

In this chapter, the Ontario Law Reform Commission will examine the rule which emanated from the Supreme Court of Canada decision in *Kendall v. The Queen*.¹ This rule has been responsible for substantially undermining the evidence furnished by children and in the Commission's opinion, ought to be statutorily abolished.

In *Kendall v. The Queen*,² the Supreme Court held that a rule of practice has emerged in Canada which requires the trial judge, in every case in which a child testifies, to warn the trier of fact of the danger of accepting the uncorroborated evidence of a child. According to Judson J., there is a "special risk in acting on the uncorroborated evidence of a young child, even when sworn".³ The Court stated that the duty of the judge to give this instruction is attributable to the "mental immaturity" of the child.⁴ It was the opinion of the Supreme Court that the following are underdeveloped in children:⁵

1. their capacity of observation;
2. their capacity of recollection;
3. their capacity to understand questions put and frame intelligent answers;
4. their moral capacity.

Kendall has been cited with approval by the Supreme Court of Canada in *Horsburgh v. The Queen*⁶ as well as by Ontario courts in both civil and criminal decisions.⁷ These cases have held that it is a misdirection for a

¹ [1962] S.C.R. 469, 132 C.C.C. 216 (subsequent references are to 132 C.C.C.).

² *Ibid.*

³ *Ibid.*, at 221.

⁴ *Ibid.*, at 220.

⁵ *Ibid.*

⁶ [1967] S.C.R. 746, 63 D.L.R. (2d) 699.

⁷ See, for example, *R. v. Tennant and Naccarato* (1975), 7 O.R. (2d) 687, at 695, 23 C.C.C. (2d) 80, at 87-88 (C.A.) (subsequent reference is to C.C.C. (2d)); *R. v. Burdick* (1975), 27 C.C.C. (2d) 497, 32 C.R.N.S. 163 (C.A.); *R. v. Gratton* (1985), 7 O.A.C. 190,

judge to treat the sworn testimony of a child and an adult in the same manner. For instance, in the Ontario Court of Appeal decision of *R. v. Tennant and Naccarato*,⁸ the accused were charged with murder. Three child eyewitnesses offered sworn testimony at trial. The Ontario court held that the failure of the trial judge to warn the jury of the frailties of the evidence of the children, as required by the Supreme Court in *Kendall and Horsburgh*, constituted a serious error and a misdirection.⁹ As a result, the convictions of each of the accused were set aside and a new trial was ordered.

In *Children's Aid Society of Kingston v. Mr. and Mrs. H.*,¹⁰ an action was instituted pursuant to the *Child Welfare Act*¹¹ for an order committing the defendant's children to the care and custody of the Crown. It was argued by the Children Aid's Society that the children, aged ten and twelve years, were in need of protection as they had been physically and sexually abused by the defendant father. At trial, the children offered testimony under oath. Thomson J. felt bound by the statements in *Kendall* respecting the "frailty" of children's evidence and instructed himself that even though the children gave sworn testimony, it was mandatory that their evidence be seriously scrutinized.¹² According to Thomson J., a child's poor memory, undeveloped moral capacity, suggestibility, and inability to discern fact from fantasy, may affect the probative value of the child's evidence.¹³

The *Kendall* warning has been criticized as one of the many ways in which the legal system transmits negative views about the quality of children's evidence.¹⁴ As Leippe, Brigham, Cousins and Romanczyk¹⁵ argue,

18 C.C.C. (3d) 462; leave to appeal refused (1988), 11 O.A.C. 144n, 18 C.C.C. (3d) 462n (S.C.C.); *R. v. Khan*, unreported (April 5, 1991) (Ont. Ct. (Gen. Div.)); and *Children's Aid Society of Kingston v. Mr. and Mrs. H.*, unreported (June 16, 1977) (Ont. Prov. Ct. (Fam. Div.)).

⁸ *Ibid.*

⁹ *Ibid.*, at 87-88.

¹⁰ *Supra*, note 7.

¹¹ R.S.O. 1970, c. 64.

¹² *Children's Aid Society of Kingston v. Mr. and Mrs. H.*, *supra*, note 7.

¹³ *Ibid.* Note that in holding that the children were in need of protection, Thomson J. stated that the evidence of the children was precise, consistent and credible.

¹⁴ R. Bessner, "The Competency of the Child Witness: A Critical Analysis of Bill C-15" (1984), 31 Crim. L.Q. 481, at 500.

¹⁵ "The Opinions and Practices of Criminal Attorneys Regarding Child Eyewitness: A Survey" in S.J. Ceci, D.F. Ross and M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989) 100. See, also, G.S. Goodman, J.M. Golding and M.M. Haith, "Jurors' Reactions to Child Witnesses" (1984), 40 J. Soc. Issues 139, at 148.

competency examinations for children under fourteen years, the corroboration rule for the unsworn testimony of children, and cautionary instructions respecting the sworn evidence of children, are some of the legal rules responsible for propagating and perpetuating the view that the testimony of children is untrustworthy and inferior to that of adults.

The previous chapters have demonstrated that there is no empirical foundation for the assumptions upon which the *Kendall* warning is based. As Power J. states in *R. v. K.B.*,¹⁶ the broad statements enunciated in the *Kendall* decision lack "any objective or scientific rationale". Similarly, Thompson states in "Taking Children And Facts Seriously: Evidence Law in Child Protection Proceedings",¹⁷ that modern psychological research has established that the generalizations about children's evidence in *Kendall* and *Horsburgh* are "overbroad, if not simply incorrect".

It is important to note that despite the repeal of the corroboration rule for the unsworn evidence of children in the 1988 amendments to the *Canada Evidence Act*,¹⁸ judges continue to give the *Kendall* warning in circumstances in which a child testifies.¹⁹ As one author observes:²⁰

In 1988 section 586 (659) of the Criminal Code and section 16(2) of the Canada Evidence Act were repealed. While the requirement of corroboration for the unsworn testimony of children was dispensed with, the legislation did not, unlike the new section 246.4, say anything forbidding a cautionary warning. For many, unfortunately, the 'wisdom' of *Kendall* will cause many judges and lawyers to continue to be distrustful of the evidence of children.

For example, in *G.B. v. The Queen*,²¹ the accused was charged with sexually assaulting an eight year old child, who was nine years old when she testified

¹⁶ (1990), 76 Alta. L.R. (2d) 129 (Q.B.), at 134.

¹⁷ (1988), 7 Can. J. Fam. Law 11, at 36.

¹⁸ R.S.C. 1985, c. C-5, amended by R.S.C. 1985, c. 19 (3rd Supp.).

¹⁹ Note also that despite the Supreme Court of Canada decision in *Vetrovec v. The Queen*; *Gaja v. The Queen*, [1982] 1 S.C.R. 811, 136 D.L.R. (3d) 89, the *Kendall* warning continues to be used by judges. The Supreme Court of Canada in *Vetrovec* abolished the common law rule respecting the corroboration of accomplice testimony and stated that general rules about the evidence of entire classes of witnesses were not appropriate. See N. Bala, *Bill C-15: New Protections for Children - New Challenges for Professionals* (Toronto: Institute for the Prevention of Child Abuse, October 1988), at 11; and R.J. Delisle, *Evidence[-] Principles and Problems* (2d ed.) (Toronto: Carwell, 1989), at 317.

²⁰ Delisle, *ibid.*, at 317.

²¹ [1990] 2 S.C.R. 30, 77 C.R. (3d) 347 (subsequent reference is to C.R.); and [1990] 2 S.C.R. 57, 77 C.R. (3d) 370.

at trial. The Supreme Court of Canada in its description of the lower court judgment, acknowledged that the trial judge had instructed himself on the frailties of children's evidence as dictated by *Kendall*.²² Nevertheless, the Supreme Court did not take the opportunity to express in unequivocal terms its rejection of the *Kendall* mandatory warning. Likewise, in *Khan*,²³ although McLachlin J. discussed the probative value of evidence that young children are capable of offering, the Supreme Court of Canada failed to overrule the 1962 decision of *Kendall v. The Queen*.²⁴

Many judges, academics and practising lawyers, have expressed reservations about a legal rule which treats an entire class of persons as unreliable witnesses. In his criticism of the mandatory warning in *Kendall*, Mr. Justice Power of the Alberta Court of Appeal states that "[t]he questioning of children and weighing of their evidence should be based upon an appreciation of their developmental stage and maturation level, not broad generalities".²⁵ Similarly, Professor Delisle writes:²⁶

No one should assume that all children are inherently suspect. The child witness should be treated like other witnesses, as an individual with whatever individual shortcomings or individual attributes that are there to be observed.

In addition, the Department of Justice in its publication *Child Victims and Witnesses: The Social Science and Legal Literatures*²⁷ as well as the Law Reform Commission of Canada²⁸ take the position that children ought to be treated as individuals and not as a class of witnesses.

It is interesting to observe that a special cautionary instruction respecting the frailty of children's evidence has never been present in England's civil law.²⁹ In New Zealand, where such a rule exists, a Bill has been drafted which provides that a judge is prohibited from giving warnings

²² *Ibid.*, at 354.

²³ [1990] 2 S.C.R. 531, 79 C.R. (3d) 1.

²⁴ *Supra*, note 1. See R. Bessner, "Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15, at 21.

²⁵ *R. v. K.B.*, *supra*, note 16, at 134.

²⁶ *Supra*, note 19.

²⁷ J.C. Yulie, M.A. King and D. MacDougall (Ottawa: Department of Justice Canada, 1988), at 38-40.

²⁸ *Report on Evidence* (Ottawa: Information Canada, 1975). See, also, J.C. Robb and L.J. Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989), 27 Alta. L. Rev. 327, at 338.

²⁹ J.R. Spencer and R. Flin, *The Evidence of Children[: The Law and the Psychology* (London, England: Blackstone Press, 1990), at 177.

respecting a child's testimony solely because the witness is a child. Such an instruction may only be given when, as is the case with adult witnesses, a real danger exists in the particular case that the evidence is untrustworthy.³⁰ In addition, the Law Reform Commission of Ireland, in its *Report on Child Sexual Abuse*,³¹ as well as the Child Sexual Abuse Task Force in Western Australia³² have recommended that common law warnings similar to those articulated in *Kendall*, ought to be abolished.

The Ontario Law Reform Commission takes the position that the Ontario Legislature ought to promulgate a statutory provision which explicitly abrogates the common law warning respecting children's evidence. Triers of fact should not be instructed about the frailties of children's testimony or cautioned about the dangers of basing their decision on the uncorroborated testimony of a child, since there is no empirical support for these propositions.

The statements enunciated in *Kendall* have been responsible for transmitting negative views about the reliability of children's evidence. In addition, because of the difficulties often encountered in obtaining corroboration of a child's testimony, the *Kendall* rule has been an impediment to the success of many cases in Ontario.

The Commission subscribes to the view that the quality of a child's evidence ought to be judged on an individual basis, as is the situation with adult witnesses. A child's testimony should not be automatically labelled as untrustworthy and unreliable solely because the person that is offering the evidence is a child.

³⁰ Law Reform (Miscellaneous Provisions) Bill 1989.

³¹ Law Reform Commission of Ireland, *Report on Child Sexual Abuse* (September 1990), at 57-60.

³² See discussion in Law Reform Commissioner of Tasmania *Child Witnesses* (1989).

CHAPTER 4

THE APPLICABILITY OF THE HEARSAY RULE TO THE STATEMENTS OF CHILDREN

1. INTRODUCTION

The hearsay rule, one of the oldest canons in the law of evidence,¹ is defined as follows:²

Written or oral statements, or communicative conduct made by persons who are not testifying are inadmissible if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein.

The orthodox reason for the inadmissibility of hearsay evidence is that such evidence is inherently unreliable.³ Common law cases have repeatedly stated that the primary reason for the exclusion of hearsay statements is the absence of an opportunity of the opposing party to cross-examine the declarant or maker of the statement, in order to test the declarant's perception, memory, narration and sincerity.⁴

The hearsay rule and the many exceptions to the hearsay rule which were created by the courts over the years have undergone substantial

¹ D.J. Foté, "Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems, and Proposals for Reform" (1985), 13 *Pepperdine L. Rev.* 157, at 166.

² Sopinka and S.N. Lederman, *The Law of Evidence in Civil Cases* (Toronto: Butterworths, 1974), at 39-40.

³ J.R. Spencer and R. Flin, *The Evidence of Children[: The Law and the Psychology]* (London, England: Blackstone Press, 1990), at 101. See, also, D. Whitcomb, E.R. Shapiro and L.D. Stelwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* (Washington, D.C.: U.S. Department of Justice, National Institute of Justice, August, 1985), at 69.

⁴ D.A.R. Thompson, "Children Should Be Heard But Not Seen: Children's Evidence in Protection Proceedings" (National Family Law Programme) (Calgary: July 1990), at H2-9.

criticism in recent times.⁵ Many argue that the hearsay rules are "needlessly complicated" and "lack any coherent unifying principle".⁶ As Lord Devlin states in *Official Solicitor to the Supreme Court v. K*,⁷ there "are rules of convenience rather than of principle, and the rule against hearsay... is among them". Critics also have commented that the orthodox reasons for refusing to admit hearsay statements vanish in circumstances in which the maker of the statement is available to testify at trial.⁸ Many argue that hearsay statements should be relegated to an issue of weight rather than admissibility.⁹ Indeed, some jurisdictions have passed legislation which abolishes the hearsay rule in civil proceedings.¹⁰

In particular, the hearsay rule is considered a "disaster for justice in cases where children are concerned".¹¹ As Spencer and Flin state, the "competency requirement and the rigours of the adversarial system often prevent children giving evidence in court themselves; and the hearsay rule makes it impossible for other people to repeat in court the accounts children gave them".¹² As a result, the courts are compelled to deal with acts perpetrated against children without being able to hear the child's version of what occurred.¹³

Why are a substantial number of commentators urging the reform of the hearsay rule for the statements of children? Firstly, the hearsay evidence of a child may constitute the best evidence of the subject matter that is being litigated.¹⁴ Many involved in the legal system, including child psychologists

⁵ The numerous exceptions to the hearsay rule will not be canvassed in this Report. For a comprehensive discussion, see Sopinka and Lederman, *supra*, note 2, at 49-150; and R.J. Delisle, *Evidence[:] Principles and Problems* (2d ed.) (Toronto: Carswell, 1989), at 364-422.

⁶ Spencer and Flin, *supra*, note 3, at 135.

⁷ [1965] A.C. 201, at 238, [1963] 3 All E.R. 191, at 208 (H.L.).

⁸ R. Bessner, "Khan: Important Strides Made by the Supreme Court Respecting Children's Evidence" (1990), 79 C.R. (3d) 15, at 20.

⁹ Spencer and Flin, *supra*, note 3, at 102.

¹⁰ See, for example, *Civil Evidence Act (Scotland) 1988*.

¹¹ Spencer and Flin, *supra*, note 3, at 136.

¹² *Ibid.*

¹³ J.C. Yuille, M.A. King and D. MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (Ottawa: Department of Justice Canada, 1988), at 46.

¹⁴ Law Reform Commission of Western Australia, *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Perth, Australia: April 1990), at 13; and T. Proffitt, *Comment on State v. D.R.* (1988), 20 Rutgers L.J. 295, at 298.

and psychiatrists, believe that the spontaneous statement of a child is generally extremely accurate.¹⁵

A second reason put forth for the admissibility of out-of-court statements of a child is that these statements may be the only substantive evidence of the subject of the proceedings.¹⁶ In cases of physical or sexual abuse, for example, the evidence of a child is often the primary and sole evidence. As Judge d'A. Collings states, the second-hand evidence of children is often the only way of bringing child abuse cases to court.¹⁷ Many Ontario judges share the view that particularly:¹⁸

[when] proceedings concern the best interests, safety, and in some cases, the life of a child [g]iven the enormous importance of such issues, the rules of evidence should stand aside when they would prevent the Court from hearing all the available evidence which might assist in determining the appropriate result.

Madam Justice Wilson, in the Supreme Court of Canada decision *G.B. v. The Queen* states that it is "desirable" for the courts to adopt "a much more benign attitude to children's evidence".¹⁹

A further reason for the liberalization of the hearsay rule respecting the statements of children is the desire on the part of both lawyers and judges to spare the child the traumatic experience of testifying in court.²⁰ As Thomson J. states in the context of an Ontario child protection case, "no one can deny the great difficulties potentially facing a child who must give evidence and be cross-examined in the alien environment of a

¹⁵ See J.Y. Parker, "The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?" (1982), 17 New Eng. L.Rev. 643, at 670.

¹⁶ Proffitt, *supra*, note 14, at 309; J.R. Christiansen, "The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews" (1987), 62 Wash. L. Rev. 705; *G.B. v. The Queen*, [1990] 2 S.C.R. 30, 77 C.R. (3d) 347 (subsequent references are to 77 C.R. (3d)); and C. Tremblay, "Les déclarations des enfants en bas âge au sujet des abus sexuels dont ils ont été victimes: une preuve admissible par exception" (1989), 30 C. de D. 257.

¹⁷ "Assessing the Second-hand Evidence of Children" (1989), 47 Advocate 369, at 374 and 371.

¹⁸ *Re Kathleen R.*, unreported (August 31, 1983, Ont. Prov. Ct., (Fam. Div.)), at 14, *per* Thomson J.

¹⁹ *Supra*, note 16, at 369.

²⁰ A.P. Nasmith, "The Inchoate Voice" (Toronto: 1990) (unpublished paper), at 39; and A.P. Nasmith, "Legal Structure in Child Protection Proceedings" in N. Bala, J.P. Hornick and R. Vogl (eds.), *Canadian Child Welfare Law* (Toronto: Thompson Educational Publishing, 1991) 310, at 313.

courtroom...."²¹ In cases in which a child is offered as a witness at trial, the child is often so intimidated by the court proceedings that she refuses to recount what she has witnessed.²² If the child's statements to a third party are held to be inadmissible as violating the hearsay rule, potentially valuable evidence of what transpired will not be considered by the court in its deliberations.

2. THE GENERAL INAPPLICABILITY OF THE HEARSAY EXCEPTIONS TO THE STATEMENTS OF CHILDREN

Many exceptions to the hearsay rule have been created by the courts over the years to counter the rigidity of this rule of evidence. Most hearsay exceptions have been justified on the ground that the circumstances under which the statement was made provide "sufficiently strong indicia of reliability" allowing the trier of fact to reach the truth.²³ Some hearsay exceptions also require that grounds of necessity be established for the admissibility of the statement.²⁴ However, the problem regarding the hearsay statements of children is that they do not generally satisfy the hearsay exceptions that currently exist. As Professor Thompson states, the "reception of hearsay evidence from children is rare in the common law, which still defines the bulk of the exceptions".²⁵ As an illustration, the Commission will briefly describe the hearsay exceptions most often drawn upon respecting the statements of children — party admissions, statements of physical, mental or emotional state, and spontaneous declarations. The Commission will explain why the hearsay statements of children do not generally satisfy the requirements prescribed for the applicability of each of these hearsay exceptions.

²¹ *Re Kathleen R.*, *supra*, note 18, at 36.

²² R. Eatman, *Special Hearsay Exceptions* (No. 2) (Alexandria Virginia: National Center for the Prosecution of Child Abuse, March 1987), at 3.

²³ Proffitt, *supra*, note 14, at 304; and Thompson, *supra*, note 4, at H2-9.

²⁴ See Delisle, *supra*, note 5, at 383 *et seq.*

²⁵ D.A.R. Thompson, "Taking Children and Facts Seriously: Evidence Law in Child Protection Proceedings - Part I" (1988), 7 Can. J. Fam. L. 11, at 46.

(a) PARTY ADMISSIONS

This hearsay exception is based on the adversarial nature of our legal system.²⁶ The requirements for the admissibility of party admissions is as follows:²⁷

a statement is admissible against a party to prove the truth of the matter asserted if he made it in his personal capacity, if he expressly adopted it or if it is reasonable to infer that he adopted it...²⁸

The difficulty with the use of this hearsay exception is the requirement of party status for the child.²⁹ For example, a child is not generally a party to a custody dispute and consequently, the child's out-of-court statements will not satisfy the party admission exception to the hearsay rule.³⁰ Similarly, a child who was an eyewitness to a traffic accident or to an assault will not have party status. Moreover, some writers argue that even if the child does acquire party status, serious problems remain with the use of this hearsay exception for children's evidence.³¹ For example, *McCormick on Evidence*³² states that the "adversary roots of admissions by parties make caution appropriate in applying this reasoning to statements by children".

(b) STATEMENTS OF PHYSICAL, MENTAL OR EMOTIONAL STATE

The common law exempts from the hearsay rule, statements of a person's then existing physical, mental or emotional state.³³ The rationale for this hearsay exception is reliability.³⁴

1. The declarant, if any one, should be able to perceive his own sensations or feelings.

²⁶ *Ibid.*, at 50. See Sopinka and Lederman, *supra*, note 2, at 140.

²⁷ *Report of the Federal/Provincial Task Force on Uniform Rules of Evidence* (Toronto: The Uniform Conference and Carswell Company Limited, 1982), at 559, s. 60.

²⁸ There is much debate as to whether party admissions ought to be characterized as hearsay. See Sopinka and Lederman, *supra*, note 2, at 140.

²⁹ Thompson, *supra*, note 25, at 50.

³⁰ N. Bala and J. Anweiler, "Allegations of Sexual Abuse in a Parental Custody Dispute: Smokescreen or Fire?" (1987), 2 Can. Fam. L.Q. 343, at 363.

³¹ Thompson, *supra*, note 25, at 51.

³² E.W. Cleary (ed.) (3d ed.) (St. Paul, Minn.: West, 1984), at 778.

³³ Thompson, *supra*, note 25, at 48.

³⁴ Delisle, *supra*, note 5, at 245-46.

2. The declaration is of the moment and defects of memory are absent.
3. There is lack of an opportunity to fabricate.

The difficulty with the application of this hearsay exception to the statements of children is the requirement of strict contemporaneity — the statement must relate to a present, not a past, state or condition.³⁵ Therefore, what a child spontaneously tells a parent, teacher or caregiver she has previously experienced, will not meet this hearsay exception.

(c) SPONTANEOUS DECLARATIONS OR EXCITED UTTERANCES

Over the past few years, the spontaneous declaration exception was considered the most promising in terms of its applicability to the statements of children.³⁶ For this reason, the Commission will describe the requirements for this hearsay exception as well as explain how the interpretation recently placed on spontaneous declarations by the Supreme Court of Canada³⁷ has created substantial obstacles to the admissibility of hearsay statements of children under this exception.

This hearsay exception is applicable to a spontaneous statement made while the declarant was under the stress of nervous excitement caused by a startling event.³⁸ According to the Privy Council in *Ratten v. The Queen*³⁹ which established the spontaneous declaration exception, the admissibility of hearsay statements under this exception is contingent on the possibility of fabrication or concoction. The statement need not be made strictly contemporaneous with the event as long as the stress created by it is ongoing and the statement is made before there has been time to contrive.⁴⁰

With the test of spontaneity rather than exact contemporaneity, this hearsay exception was regarded as having significant potential with respect to the statements of children. As more cases involving young children reached the courts, it was expected that the scope of this hearsay exception would be widened since the temporal element could be liberally construed

³⁵ Thompson, *supra*, note 25, at 49.

³⁶ See *ibid.*, at 47.

³⁷ *Khan v. The Queen*, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1 (subsequent references are to 77 C.R. (3d)).

³⁸ *Ratten v. The Queen*, [1972] A.C. 378, [1971] 3 All E.R. 801.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

to extend to several hours or even a few days. This trend, which had already occurred in the United States, appeared to be emerging in Canada and in particular, in Ontario.⁴¹

In the United States, "excited utterances" have become a usual vehicle for putting children's hearsay statements before a court.⁴² This hearsay exception has been stretched to cover statements made as long as several hours or days after the incident occurred provided that the statements of the child are spontaneous.⁴³ In *State v. Wallace*,⁴⁴ for example, the Ohio Supreme Court held that a fifteen hour time lapse did not destroy the startling effect of an attack on a child. In this case, a five year old girl had been left by her mother at her grandmother's apartment. Two hours later, the child was found bruised, cut and strangled. The child was taken to the hospital in a coma where she drifted in and out of consciousness throughout the evening and into the morning. Fifteen hours after the assault, the child was interrogated by a social worker at the hospital. The Court held that the statements of the child to the social worker were admissible pursuant to the "excited utterance" exception to the hearsay rule as the child's statements were spontaneous.⁴⁵ It is noteworthy that the attack on the child did not involve sexual abuse and that the court did not limit the expansion of this hearsay exception to statements of child victims. Subsequent to the *Wallace* decision, the Ohio Legislature introduced a child hearsay exception.⁴⁶

The Ontario courts, in the last few years, appeared to be taking a similar approach to that of the United States. In *R. v. Scott*,⁴⁷ a three and one-half year old child was allegedly sexually assaulted in a daycare facility

⁴¹ See *R. v. Khan* (1988), 64 C.R. (3d) 281 (Ont. C.A.); *R. v. Scott*, unreported (June 21, 1990, Ont. Dist. Ct.); and *R. v. Babinski*, unreported (April 3, 1989, Ont. Dist. Ct.).

⁴² Spencer and Flin, *supra*, note 3, at 107; C.J. Hennings, "Accommodating Child Abuse Victims: Special Hearsay Exceptions in Sexual Offense Prosecutions" (1989), 16 Ohio North L. Rev. 663, at 667; and Parker, *supra*, note 15, at 671.

⁴³ See Whitcomb, Shapiro and Stellwagen, *supra*, note 3, at 71. These authors state that despite the court's willingness to broaden the temporal requirement of this hearsay exception, there are still many cases where the exception does not apply. There are many instances in which a child's delay in making a statement may exceed even the most liberal interpretation of the excited utterance exception. Reasons for a child's reluctance to report what she has witnessed include fears of not being believed, feelings of confusion and guilt, efforts to forget, and threats against the child if she discloses what she has witnessed. See, also, Hennings, *supra*, note 42, at 668.

⁴⁴ 37 Ohio St. 3d 87, 524 N.E. 2d 466 (1988).

⁴⁵ *Ibid.*

⁴⁶ Ohio Rev. Code Ann., Section 2151.35(F) (Anderson Supp. 1989).

⁴⁷ *Supra*, note 41.

operated by the mother of the accused. The Court held that the statements of the child to his mother, one and one-half days after the event, were admissible in evidence as excited utterances. According to Corbett D.C.J., the trial judge did not err either in admitting the statements of the child to his mother as proof of the contents of the statement or in admitting the actions of the child in the description of the incident to his mother. Madam Justice Corbett held:⁴⁸

[S]tatements by a young child within a reasonable time in circumstances where the possibility of concoction or distortion or error is excluded and where there is no indication of a motive for fabrication or concoction, are admissible in evidence for the truth of their contents.

The Court cited the Supreme Court of Canada in *G.B. v. The Queen*⁴⁹ for the proposition that the judiciary ought to adopt a liberal approach with respect to the evidence of children.

A similar approach to this hearsay exception has been endorsed by several academics. For instance, Professor Thompson states:⁵⁰

In my view, a better appreciation of the modern basis for this exception which is implicit in its phrasing as an 'excited utterance' would permit wider admissibility of children's statements, so long as counsel lay a proper foundation demonstrating the spontaneous nature of the statement and the child's condition of excitement at the time of the statement. One would think it easier to convince a judge that the 'risk of concoction or fabrication' is much less in the case of a child—especially a young child—than an adult.

This liberal approach to the spontaneous declaration exception came to an abrupt halt in the Supreme Court of Canada decision *Khan v. The Queen*.⁵¹ As can be recalled, the accused physician was charged with sexually assaulting his three and one-half year old patient. Fifteen minutes after leaving the accused's office, the child described the sexual act to her mother. In contrast to the holding of the Ontario Court of Appeal, the Supreme Court of Canada refused to allow the child's statement to her mother to be admitted under the spontaneous declaration exception to the hearsay rule. McLachlin J. stated that the child's statement was not made under conditions of emotional intensity.⁵² This was despite the *dicta* in

⁴⁸ *Ibid.*, at 15.

⁴⁹ *Supra*, note 16.

⁵⁰ Thompson, *supra*, note 25, at 48.

⁵¹ *Supra*, note 37.

⁵² *Ibid.*, at 8.

Ratten v. The Queen,⁵³ cited with approval in many Canadian decisions,⁵⁴ that the statement need not be made strictly contemporaneous to the event. Taking account of the fact that only a brief time had elapsed between the alleged sexual episode and the child's statement to her mother, that the child was only three and one-half years old at the time of the sexual assault, and that young children are not "adept at reasoned reflection or at fabricating tales of sexual perversion",⁵⁵ one may question why the Supreme Court came to the conclusion that the child's statement did not satisfy the spontaneous declaration exception. The Court undoubtedly has narrowly circumscribed this hearsay exception with the effect that many out-of-court statements of children will no longer be admissible under the spontaneous declaration exception to the hearsay rule.⁵⁶ Instead, the Supreme Court decided to take the *Ares v. Venner*⁵⁷ approach to the hearsay statements of the child, an approach which will now be discussed.

3. THE *ARES v. VENNER* APPROACH

Are judges free to create and develop new classes of hearsay exceptions or is a hearsay statement which does not fall within "pre-recognized pigeonhole exceptions"⁵⁸ inadmissible in evidence? In the landmark decision of *Ares v. Venner*,⁵⁹ the Supreme Court of Canada addressed this issue.

In *Ares v. Venner*,⁶⁰ the plaintiff sued for medical malpractice, which he alleged had resulted in the amputation of his leg for gangrene. The plaintiff sought to introduce hospital records containing entries by nurses as evidence of the onset of symptoms which, he argued, doctors should have noticed and treated. In admitting the evidence, the Court endorsed the Wigmorean approach to the hearsay rule and held that the hearsay exceptions can be expanded as long as:

⁵³ *Supra*, note 38. *Ratten v. The Queen* was applied by the House of Lords in *R. v. Andrews*, [1987] 1 All E.R. 513.

⁵⁴ See, for example, *R. v. Babinski supra*, note 41; *R. v. Schwartz* (1978), 25 N.S.R. (2d) 335, 40 C.C.C. (2d) 161 (C.A.); and *R. v. Slugoski* (1985), 17 C.C.C. (3d) 212, 43 C.R. (3d) 369 (B.C.C.A.).

⁵⁵ *R. v. Khan, supra*, note 41, at 292. See, also, M. McGrath and C. Clemens, "The Child Victim as a Witness in Sexual Abuse Cases" (1985), 46 U. Mont. L. Rev. 229, at 240.

⁵⁶ See Bessner, *supra*, note 8, at 18-19.

⁵⁷ [1970] S.C.R. 608, 12 C.R.N.S. 349 (subsequent references are to 12 C.R.N.S.).

⁵⁸ Delisle, *supra*, note 5, at 475.

⁵⁹ *Supra*, note 57.

⁶⁰ *Ibid.*

- (1) there are grounds of necessity for the statement; and
- (2) there are assurances that the hearsay source is reliable.⁶¹

The Supreme Court of Canada decision has been described in the following manner:⁶²

The decision in *Ares v. Venner*... should be seen as an invitation to depart from the strictures of the hearsay rule when not to do so would amount to an emphasis upon legal formalism over the desire to receive trustworthy evidence in a practical and sensible manner.

The most prominent example in recent years is the evolving new hearsay exception for the statements of children, particularly regarding statements of sexual abuse.⁶³ Greater awareness of the magnitude of the problem of sexual abuse, increased reporting of such cases, and acknowledgment of the difficulty in establishing sexual abuse, have resulted in a new approach by some judges to the out-of-court statements of children in sexual abuse cases.⁶⁴

The unique circumstances of sexual abuse have been recognized by some members of the judiciary. It is stated that in such cases, the child's statements are often the sole evidence of the abuse, as witnesses are rare and physical evidence is seldom present.⁶⁵ It has also been acknowledged that the hearsay statements of sexually abused children do not generally fall within any of the enumerated exceptions to the hearsay rule. For example, the spontaneous declaration exception, even if liberally construed, is of limited application as a child's shame or ignorance that a wrong has been

⁶¹ *Ibid.*, at 356.

⁶² *Re Kathleen R.*, *supra*, note 18, at 13.

⁶³ D.A.R. Thompson, "Rules of Evidence and Preparing for Court" in N. Bala, J.P. Hornick and R. Vogl (eds.), *Canadian Child Welfare Law* (Toronto: Thompson Educational Publishing, 1991) 263, at 292.

⁶⁴ *Ibid.*, at 296.

⁶⁵ N.E. Davis, Jr., "The Cry of an Abused Child: Ohio's Expansion of the Excited Utterance Exception to the Hearsay Rule - *State v. Wallace*" (1989), 14 U. Dayton L. Rev. 399, at 410; Eatman, *supra*, note 22, at 1; and Foté, *supra*, note 1.

committed can lead to a long interval between the abuse and disclosure by the child.⁶⁶

As previously mentioned, the Supreme Court of Canada in *Khan v. The Queen*⁶⁷ refused to allow the child's statement to her mother, describing the sexual encounter she had with Dr. Khan, to be admitted under the spontaneous declaration exception to the hearsay rule. The Supreme Court of Canada cited *Ares v. Venner* and stated:⁶⁸

The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law of hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.

The Court held that the child's hearsay statements could be received if the requirements of necessity and reliability, as described in *Ares v. Venner*, were satisfied. McLachlin J. stated that the child's statement need only be "reasonably necessary".⁶⁹ By way of example, the Court stated that if the child is found to be incompetent to testify, or if it is established that giving testimony in court will be too traumatic for the child, the "necessity" prong of this hearsay exception will be satisfied. It is essential to note that the court stated that it may not be "necessary" to introduce the child's hearsay statements into evidence, if in the new trial (which was ordered by the Supreme Court), the trial judge finds the child competent to give *viva voce* evidence.⁷⁰

With respect to the requirement of reliability of the statements, McLachlin J. stated that considerations such as timing, demeanour, the

⁶⁶ See authorities cited, *supra*, note 65. As Beckett U.F.C.J. states in the well-known case *Children's Aid Society of Hamilton-Wentworth v. D.C.*, unreported (March 30, 1987) (Ont. U.F.C.), at 9:

It is evident to me that if society is to protect young children from sexual abuse, some traditional rules of evidence do not and cannot apply. The best evidence that we are likely to get from young children may be in the form of statements they make to others in the investigative or assessment process.

⁶⁷ *Supra*, note 37.

⁶⁸ *Ibid.*, at 9.

⁶⁹ *Ibid.*, at 13.

⁷⁰ *Ibid.*, at 15.

personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement, may be relevant to the issue of reliability.⁷¹ The Court stressed that a strict list of considerations for the "reliability" requirement ought not to be imposed; rather, the "matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge".⁷²

In the Commission's view, there does not appear to be a logical rationale for the necessity requirement regarding the hearsay statements of children. The essential difficulty with the necessity requirement is that it precludes the admissibility of both the child's hearsay statement and the *viva voce* testimony of the child. One must question why the Supreme Court is so reluctant to admit hearsay statements into evidence in cases in which the child declarant testifies. In fact, as previously stated, hearsay evidence may constitute the best evidence of what transpired. A convincing argument could be made that the hearsay statements of the three and one-half year old child in *Khan*, fifteen to thirty minutes after she allegedly performed fellatio on her doctor, is more reliable and has more probative value than the oral testimony of the child at trial, one year after the assault.⁷³

It can be recalled that the principal reason for the exclusion of hearsay statements is the absence of an opportunity for the opposing party to cross-examine the declarant, that is, to test the declarant's perception, memory, narration and sincerity.⁷⁴ In fact, McLachlin J. explicitly stated in *Khan* that in admitting the hearsay statements of children, judges must be conscious of the need to safeguard the interests of the accused as there will generally not be an opportunity to cross-examine the child.⁷⁵ In cases in which the child testifies, and can therefore be cross-examined by counsel, there does not appear to be a sound reason to prohibit a child's out-of-court statement from being tendered into evidence provided the reliability test, articulated in *Khan*, is satisfied.

It is also important to observe that many hearsay exceptions currently exist which allow out-of-court statements to be admitted into evidence regardless of whether the declarant testifies. For example, spontaneous declarations, declarations as to physical, mental or emotional states, family records, and statements in ancient documents are hearsay exceptions which

⁷¹ *Ibid.*, at 14.

⁷² *Ibid.*, at 14.

⁷³ See Bessner, *supra*, note 6, at 19-20.

⁷⁴ Thompson, *supra*, note 4.

⁷⁵ *Khan v. The Queen*, *supra*, note 37, at 14.

do not require that the declarant be unavailable to testify in order for the statement to be admissible. These hearsay exceptions have been justified on the ground that the circumstances under which the statements were made provide sufficiently strong indicia of reliability or trustworthiness.⁷⁶

4. LIBERALIZATION OF THE HEARSAY RULE IN CHILD PROTECTION PROCEEDINGS IN ONTARIO

(a) THE COMMON LAW

Evidence law is applied with varying degrees of rigour depending on the legal context.⁷⁷ In some civil proceedings in Ontario, particularly child protection proceedings, there has been a liberalization by some judges of the hearsay rule for the statements of children.

The laws of evidence evolved in the context of an adversarial system that is essentially concerned with an analysis of past events.⁷⁸ Some judges subscribe to the view that child protection proceedings are not adversarial but rather are in the nature of an inquiry where the court is interested in hearing all relevant evidence, including hearsay, that may affect a child's future.⁷⁹ As is stated in *Canadian Children's Law*,⁸⁰ "the prospective and speculative nature of the proceedings makes them quite different from ordinary litigation". This view is shared by some members of the judiciary who hear cases pursuant to the *Ontario Child and Family Services Act*,⁸¹ formerly known as the *Child Welfare Act*.⁸² As Beckett, U.F.C.J. states in *Children's Aid Society of Hamilton-Wentworth v. D.C.*:⁸³

It has been said that it is the evidentiary rules (or lack thereof) of a child welfare proceeding which so distinguishes it from other judicial proceedings. This distinction reflects society's fear that the strict application of evidentiary

⁷⁶ See Delisle, *supra*, note 5, at 397-420.

⁷⁷ Thompson, *supra*, note 63, at 282.

⁷⁸ N. Bala, H. Lilles and G. Thomson, *Canadian Children's Law*[:] *Cases, Notes and Materials* (Toronto: Butterworths, 1982), at 178.

⁷⁹ Thompson, *supra*, note 63, at 298. See discussion in *Re Kathleen*, *supra*, note 18, at 14. See, also, *D.R.H. v. Superintendent of Family and Child Services* (1984), 58 B.C.L.R. 103, 41 R.F.L. (2d) 337 (C.A.); leave to appeal to S.C.C. refused (1984), 14 D.L.R. (4th) 105n (S.C.C.).

⁸⁰ *Supra*, note 78.

⁸¹ S.O. 1984, c. 55.

⁸² R.S.O. 1980, c. 66.

⁸³ *Supra*, note 66, at 9.

rules may interfere with the presentation of all information relevant to a child's welfare.

Similarly, Judge Main states in *Re S.*:⁶⁴

Since the immediate health and/or life of a child may hang in the balance, the ordinary rules of evidence as to admissibility should be modified to reflect the gravity of the situation consistent with as fair a hearing as is possible.

The problem, however, is that there is little consistency in the judgments rendered in Ontario as to the appropriate criteria for the reception of out-of-court statements of children. Some judges rely on the *Ares v. Venner* requirements of necessity and reliability, some adopt the position that the statement need only be reliable for it to be admissible, and many judges receive the hearsay statement as evidence without stipulating the grounds upon which it is admissible. Clearly guidelines from the Ontario Legislature respecting the admissibility of out-of-court statements are necessary.

A significant proportion of judges⁶⁵ and academics⁶⁶ have urged revisions in the civil law of evidence respecting the hearsay statements of children. First, they argue that the liberalization of the hearsay rule should not be restricted to child protection cases but rather should be applicable to all types of proceedings. A second reason put forward for the reform of the law is to resolve the uncertainty regarding the relaxation of the hearsay rule in child protection trials. For instance, some judges have refused to relax the rule in the absence of any statutory direction. James J. in *Catholic Children's Aid Society of Metropolitan Toronto v. Nedeljko S.*⁶⁷ states:

[T]he society has deliberately chosen to confront the traditional rule against the admission of hearsay evidence. While one can appreciate the reluctance of the society to call young children to testify about allegations of sexual molestation, I am also mindful that this is a court of law that is bound by the ordinary rules of evidence. There are certain provisions of the *Child Welfare Act* (such as subsection 28(4) dealing with past conduct) that purport

⁶⁴ (1979), 10 R.F.L. (2d) 341 (Ont. Prov. Ct.), at 350. See, also, *E.C. v. Catholic Children's Aid Society of Metropolitan Toronto* (1982), 37 O.R. (2d) 82 (Co. Ct.); *Re Catholic Children's Aid Society of Metropolitan Toronto and Mrs. T.* (1984), 46 C.P.C. 34 (Ont. Prov. Ct. (Fam. Div.)); and *D.R.H. v. Superintendent of Family and Child Services*, *supra*, note 79.

⁶⁵ See, for example, *Re Catholic Children's Aid Society of Metro Toronto v. N.S.* unreported (December 9, 1985, Ont. Prov. Ct. (Fam. Div.)), summarized in 34 A.C.W.S. (2d) 77.

⁶⁶ Thompson, *supra*, note 25, at 45. See, also, Spencer and Flin, *supra*, note 3, at 135-36; and N.J.W., "Hearsay in Children's Proceedings" (1990), 9 Civ. Just. Q. 228.

⁶⁷ Unreported (December 1985, Ont. Prov. Ct. (Fam. Div.)), at 3-4.

to soften the harsh edges of some of these rules, but the society has not invoked any of these here because none of these provisions seem to fit the situation.

I am not a legislator and cannot create new exceptions to the rule against the admission of hearsay evidence. If the society wants to conduct its cases by having a social worker recount the details of how his or her investigation unfolded and of the information that he or she obtained from others, then it will require a substantial amendment either to the *Child Welfare Act* or to the *Ontario Evidence Act*, R.S.O. 1980, c. 145. As the law presently stands, the statements made by others that the society's worker wished to introduce may not be admitted as evidence of the truth of the matters asserted in them. See *Re Benn*, unreported decision of Noble, J., 8 June 1979, Sask. Q.B. at the Jud. Dist. of Battleford, digested at [1979] 2 A.C.W.S. 362, 2 Can. J. Fam. L. 330; *Re S.A.H. and A.E.R.A.H.* (1982), 30 R.F.L. (2d) 23 (B.C. Co. Ct.); *Re Rhonda L. (An Infant)*, an unreported decision of Vogelsang, Prov. J., 4 May 1983, Ont. Prov. Ct. (Fam. Div.) of Middlesex County, London registry C178/83, digested at 20 A.C.W.S. (2d) 156, [1983] W.D.F.L. 820, O.L.W. 10-022; and *Re Kathleen R. (An Infant)*, unreported decision of Thomson, Prov. J., 31 August 1983, Ont. Prov. Ct. (Fam. Div.) of the Jud. Dist. of York, Toronto registry C6309/82, digested at 22 A.C.W.S. (2d) 288, [1983] W.D.F.L. 1320, 6 F.L.R.R. 121.

In this case, the Ontario Provincial Court refused to receive as evidence, through the testimony of a social worker, statements made to the social worker by children who were allegedly sexually molested.

(b) STATUTORY EXCEPTIONS: THE *CHILD AND FAMILY SERVICES ACT*

A statutory hearsay exception was introduced in section 28(4) of the *Child Welfare Act* in 1979⁸⁸ and retained in the *Child and Family Services Act*.⁸⁹ Section 46(1) of the *Child and Family Services Act* provides:

46.(1) Despite anything in the *Evidence Act*, before ordering that a child be placed in or returned to the care and custody of a person other than a society, the court may consider that person's past conduct toward any child that is or has been in his or her care, and any oral or written statement or report that the court considers relevant, including a transcript, exhibit or finding in an earlier civil or criminal proceeding, may be admitted into evidence and shall be proved as the court directs.

⁸⁸ The *Child Welfare Act*, 1970, S.O. 1978, c. 85, s. 28(4). *Supra*, note 82.

⁸⁹ *Supra*, note 81, s. 46(1).

This "past-parenting" section provides that evidence of past conduct by a caregiver toward any child, including a child other than the one who is the subject of the proceedings, is admissible in evidence.⁹⁰

Much debate has surrounded the interpretation of section 46(1) of the *Child and Family Services Act*, which some judges describe as ambiguous and in need of reform.⁹¹ Uncertainty exists as to the criteria to be applied for a hearsay statement to be admissible pursuant to section 46(1). Some judges take the position that the requirements of necessity and reliability as prescribed in *Ares v. Venner* must be satisfied. This view is endorsed by Judge Nasmith in *Re Catholic Children's Aid Society of Metropolitan Toronto and Mrs. T.*:⁹²

... [T]he section, at most, confirms the discretion of the trial judge to avoid the technical, borderline or otherwise unnecessary hearsay exclusions, if these are grounds of necessity and circumstances tending to guarantee reliability. That is the essential test for hearsay that comes from *Ares v. Venner* ... and s. 28(4) could certainly be read so as to dovetail with that test.⁹³

This interpretation of section 46(1) of the *Child and Family Services Act* is unnecessarily restrictive and does not serve to sufficiently relax the hearsay rule. For example, given the requirement of "necessity", in circumstances in which a child does testify, her out-of-court statements will be held to be inadmissible.

The limited scope of section 46(1) has also been severely criticized. This section of the *Child and Family Services Act* does not apply to out-of-court statements of a child who has been physically or sexually abused by a person who is not the child's caregiver. Furthermore, section 46(1) is confined to child protection proceedings and has no application to custody and access matters.⁹⁴ Nor does it encompass situations in which a child has been an eyewitness to a civil assault, to a road accident or to another legally

⁹⁰ Thompson, *supra*, note 63, at 299. See, also, s. 47(7) of the Ontario *Child and Family Services Act*, 1984, which allows the court to "admit and act on evidence that the court considers credible and trustworthy in the circumstances" on adjournment.

⁹¹ See, for example, *Re Catholic Children's Aid Society of Metropolitan Toronto and Mrs. T.*, *supra*, note 84, at 38-39.

⁹² *Ibid.*, at 40.

⁹³ See also Weisman, Prov. J. in *Re J.C.* (1984), 39 R.F.L. (2d) 244 (Ont. Prov. Ct., (Fam. Div.)), at 249, who states that although s. 28(4) of the *Child Welfare Act* "permits hearsay [evidence] to be adduced, it should not be construed so as to enable the very conduct complained of to be proved by recorded hearsay in the absence of necessity or exceptional circumstances".

⁹⁴ Bala and Anweiler, *supra*, note 30, at 365.

significant event. It is argued that relaxation of the hearsay rule is essential in other types of proceedings involving children.

5. REFORM OF THE HEARSAY RULE IN OTHER JURISDICTIONS

Several legal systems do not have a rule prohibiting the admissibility of hearsay statements. In France, for example, a hearsay rule does not exist in either civil or criminal proceedings.⁹⁵ Moreover, in the Scandinavian⁹⁶ countries where the legal systems are basically adversarial by contrast to the inquisitorial system of France, there is no rule of evidence which precludes hearsay statements from being received.

A trend can be observed in many common law systems toward either the complete abolition of the hearsay rule or the promulgation of statutes which substantially broaden the admissibility of out-of-court statements. For instance, Scotland, in the *Civil Evidence Act (Scotland) 1988*,⁹⁷ has abolished the bar against hearsay evidence in civil proceedings. Hearsay evidence has been relegated to an issue of weight rather than admissibility.⁹⁸ In England, a series of statutes have been passed in recent years whose effect has been to relax the hearsay rule in civil cases.⁹⁹ In the United States, the Federal Rules of Evidence¹⁰⁰ after listing the various exceptions to the hearsay rule, has a general residual exception which provides that hearsay statements which possess circumstantial guarantees of trustworthiness are admissible. Many states have adopted the residual or catch-all hearsay exception contained in Rule 803(24)¹⁰¹ of the Federal Rules of Evidence. This rule permits the admissibility of a hearsay:

statement not specifically covered by any of the foregoing exceptions but having *equivalent circumstantial guarantees of trustworthiness*, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other

⁹⁵ Spencer and Flin, *supra*, note 3, at 137.

⁹⁶ *Ibid.*

⁹⁷ See S.B. Kearney, "The evidence of children - the Scottish dimension" in J.R. Spencer, G. Nicholson, R. Flin and R. Bull (eds.), *Children's Evidence in Legal Proceedings[:] An International Perspective* (Cambridge, England: 1989), (Papers from an international conference, Selwyn College Cambridge Lectures) 126, at 131.

⁹⁸ Spencer and Flin, *supra*, note 3, at 102, 133.

⁹⁹ *Ibid.*, at 119. The hearsay rule has been relaxed in different courts and in different types of civil proceedings.

¹⁰⁰ Public Law 93-595, 88 Stat. 1926 [H.R. 5463].

¹⁰¹ Spencer and Flin, *supra*, note 3, at 136.

evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

It is noteworthy that Rule 803(24) of the Federal Rules of Evidence does not require that the declarant be unavailable in order for the hearsay statement to be admissible. This residual exception has been relied upon by counsel for the admissibility of out-of-court statements of children.¹⁰²

Rule 803(24) has been heavily criticized since it requires that the hearsay statement be "more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"¹⁰³ in order for it to be admissible. It has been argued that because of this stipulation, the residual exception is stricter than many of the traditional exceptions to the hearsay rule.¹⁰⁴ It is for this reason that U.S. commentators¹⁰⁵ have suggested that a particularized hearsay exception for the statements of children be enacted by state legislatures to encompass statements which do not meet the stringent requirements of Rule 803(24) of the Rules of Evidence.

In fact, at least twenty-seven states have enacted special hearsay statutes for the out-of-court statements of children.¹⁰⁶ They are generally restricted to cases of physical abuse, neglect and sexual abuse of children. Many encompass the statements of any child witness in the above-mentioned proceedings and are not confined to the hearsay statements of the child victim. Typically, these laws provide that a child's out-of-court statement is admissible if the court finds sufficient indicia of reliability having regard to

¹⁰² Hennings, *supra*, note 42, at 668-69.

¹⁰³ *Ibid.*, at 670; and D.K. Williams, "Can You Hear What I Hear? Direction and Limitation on Allowable Hearsay Testimony in Child Sexual Abuse Cases: *State v. Campbell*" (1986), 22 *Williamette L. Rev.* 421, at 425.

¹⁰⁴ See authorities cited *supra*, note 103.

¹⁰⁵ *Ibid.*

¹⁰⁶ See Davis Jr., *supra*, note 65, at 414. See, also, B. McAllister, "Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom" (1986), 18 *St. Mary's L.J.* 279.

the "time, content and circumstances" under which the statement was made.¹⁰⁷

Several law reform bodies have recommended the liberalization of the hearsay rule. For example, the Victoria Law Reform Commission¹⁰⁸ has urged that the rule against hearsay statements of children should be revised in the context of the general reform of the hearsay rules. The 1990 Rogers Report on child sexual abuse¹⁰⁹ proposes that all provincial legislatures in Canada pass statutes broadening the admissibility of hearsay statements of children:

That provincial/territorial governments amend their legislation to facilitate the giving of evidence by children in civil cases. They should expand the scope for use of videotapes and out-of-court statements of children, and should at least ensure that child witnesses receive all the benefits of Bill C-15.

In addition, the Badgley Report on *Sexual Offences Against Children*¹¹⁰ in criminal proceedings recommends that:

1. A previous statement made by a child when under the age of 14 which describes or refers to any sexual act performed with, on, or in the presence of the child by another person.
2. Is admissible to prove the truth of the matters asserted in the statement.
3. Whether or not the child testifies at the proceedings.
4. Provided that the court considers, after a hearing conducted in the absence of the jury, that the time, content and circumstances of the statement afford sufficient indicia of reliability.
5. "Statement" means an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion.

It is important to note that reliability is the criterion for the admissibility of the child's hearsay statement and that the hearsay statement is receivable

¹⁰⁷ See, for example, Colo. Rev. Stat. 13-25-134 (1987) and 18-3-411(3) (1985); and Ky. Rev. Stat. Ann. 421.355 (Baldwin 1986).

¹⁰⁸ Victoria Law Reform Commission, *Sexual Offences Against Children* (November 1988).

¹⁰⁹ R.G. Rogers, *Reaching for Solutions*[:] *The Summary Report of the Special Advisor to the Minister of National Health & Welfare Child Sexual Abuse in Canada* (Ottawa: Health and Welfare Canada, 1990), at 24-25, Recommendation 43.

¹¹⁰ Canada, *Sexual Offences Against Children*[:] *Report of the Committee on Sexual Offences Against Children and Youths* (Chair: R.F. Badgley) (Ottawa: 1984), at 71.

regardless of whether the child testifies. A similar proposal to that of the Badgley Report was made by the New Zealand Advisory Committee.¹¹¹

6. RECOMMENDATION

The Ontario Law Reform Commission is of the view that legislation ought to be passed in this province which broadens the admissibility of hearsay statements of children. The hearsay rules in their present form are no longer satisfactory and, to borrow the words of McLachlin J. in the Supreme Court decision of *Khan v. The Queen*,¹¹² have "frequently proved unduly inflexible in dealing with new situations and new needs in the law".

The hearsay rules have become extremely complex and it is the opinion of many judges that the hearsay exceptions have been stretched to their limits in order to receive the out-of-court statements of children. In addition, the rule in *Ares v. Venner*¹¹³ which mandates a "necessity requirement" has circumscribed the scope for the admissibility of hearsay statements of children. Ontario judges have taken different approaches to the hearsay rule with respect to children's statements and consequently, there is uncertainty and inconsistency in the law as to the circumstances in which a child's statement will be held to be admissible.

The Commission takes the position that providing the judge is satisfied that the hearsay statement of a child is sufficiently reliable, the statement should be admitted into evidence.¹¹⁴ The trier of fact can then assess the appropriate weight to be given to the out-of-court statement. We do not believe that the new legislation ought to be restricted to cases of physical or sexual abuse, but rather should be applicable to all civil proceedings. Nor should the admissibility of hearsay statements of children be contingent on whether the child testifies. In other words, the "necessity" requirement specified in *Ares v. Venner*¹¹⁵ should not be a criterion for the admissibility of hearsay statements of children. Rather, reliability should be the sole

¹¹¹ The Advisory Committee was established by the Parliament of New Zealand in October 1989 and the Committee's recommendations are included in *Law Reform (Miscellaneous Provisions) Bill 1989*.

¹¹² *Supra*, note 37, at 9.

¹¹³ *Supra*, note 57.

¹¹⁴ Although the Ontario legislature may desire to list examples of reliability such as timing, demeanour, the absence of any reason to fabricate, we believe that a strict list of considerations should not be imposed by the Legislature. See *Khan v. The Queen*, *supra*, note 37.

¹¹⁵ *Supra*, note 57.

requirement for the admissibility of out-of-court statements of young witnesses. It is our opinion that the new rule respecting the hearsay evidence of children proposed by the Commission will introduce clarity into the law and will permit what may be extremely probative evidence to reach the courts, without sacrificing the fundamental common law principle for the exclusion of hearsay statements.

CHAPTER 5

ACCOMMODATION OF CHILD WITNESSES

1. INTRODUCTION

The recent psychological studies on the testimonial capacity of children along with the growing appreciation of the particular vulnerability of young witnesses, has precipitated reforms in many jurisdictions. There is now a realization that furnishing evidence in court can be extremely traumatic for a child. The imposing atmosphere of the courtroom, repetition of details of an event to strangers in public, cross-examination, face-to-face confrontation, and physical separation from a parent or trusted relative, are some of the aspects of providing evidence which profoundly affect child witnesses.¹ As Parker observes, the system of justice is adult-oriented and is not designed to handle cases in which children are involved as witnesses.² Members of the

¹ C.L. Hobson, "Appointed Counsel to Protect the Child Victim's Rights" (1990), 21 Pac. L.J. 691, at 693; G.S. Goodman, "The Child Witness: Conclusions and Future Directions for Research and Legal Practice" (1984), 40 J. Soc. Issues 157, at 167; J.Y. Parker, "The Rights of Child Witnesses: Is The Court A Protector Or Perpetrator?" (1982), 17 New Eng. L. Rev. 643, at 646; A. Yates, "Should Young Children Testify in Cases of Sexual Abuse?" (1987), 144 Am. J. Psychiatry 476; R.L. Galloway, "Confronting Child Sexual Abuse: Altering Courtroom Procedure to Prevent a Second Assault" (1990), 32 S. Tex. L. Rev. 137, at 147-48; and J.R. Spencer and R. Flin, *The Evidence of Children[.] The Law and the Psychology* (London, England: Blackstone Press, 1990), at 283. See, also, *Re Kathleen R.*, unreported (August 31, 1983, Ont. Prov. Ct. (Fam. Div.)); *Catholic Children's Aid Society of Metropolitan Toronto v. Nedeljko S.*, unreported (December 1985, Ont. Prov. Ct. (Fam. Div.)); and *R. v. Beliveau* (1986), 30 C.C.C. (3d) 193, at 204 (B.C.C.A.).

² Parker, *supra*, note 1, at 647. See, also, L.M. Duggan III, M. Aubrey, E. Doherty, P. Isquith, M. Levine, and J. Scheiner, "The Credibility of Children as Witnesses in a Simulated Child Sex Abuse Trial" in S.J. Ceci, D.F. Ross, M.P. Toglia (eds.), *Perspectives on Children's Testimony* (New York: Springer-Verlag, 1989) 71, at 73; Ontario Medical Association's Committee on Child Welfare, "The Child in Court: Some Changes Needed" (1987) Ont. Med. Rev. 93, at 94; and N. Bala, "Double Victims: Child Sexual Abuse and the Canadian Criminal System" (1990), 15 Queen's L.J. 3, at 17.

judiciary, such as Mr. Justice Morden in the Ontario Court of Appeal,³ have acknowledged that:

child witnesses may be, in some important respects, different from adult witnesses and, accordingly, face to face confrontation affects them differently than it does adults ... In some cases, ... eye to eye contact may frustrate the obtaining of as true an account from the witness as is possible.

There is also recognition that the ultimate goal of the legal process, that is, to ascertain the truth, may be frustrated if children are treated in the same manner as adult witnesses.⁴

Much criticism has been directed at the adversarial system. It is asserted that the adversarial style of legal proceedings inhibits children from furnishing accurate and complete evidence.⁵ In addition, many social workers and psychologists contend that the adversarial system is responsible for the short or long term psychological damage suffered by children as a result of testifying in court.⁶ Goodman is highly critical of cross-examination in which counsel attacks the credibility of young witnesses and suggests to the child that she is either lying or mistaken.⁷ As McEwan states, where "children are caught up in the gladiatorial contest between parties which is our adversarial method of trial, they are bound to suffer".⁸ Similarly, Spencer and Flin write that "the features of the accusational system that make it stressful and

³ *R. v. Levogiannis* (1990), 1 O.R. (3d) 351, at 375 and 367, 62 C.C.C. (3d) 59, at 84 and 75 (C.A.) (subsequent references are to 1 O.R. (3d)).

⁴ C.F. Graham, "Sequestration Screens for Young Complainants in Criminal Prosecutions: Early Developments in Canada" (1990), 32 *Crim. L.Q.* 227, at 230. See, also, J.R. Spencer, "Children's evidence in legal proceedings in England", in J.R. Spencer, G. Nicolson, R. Flin and R. Bull (eds.), *Children's Evidence in Legal Proceedings[:] An International Perspective* (Cambridge, England: 1989) (Papers from an International Conference, Selwyn College Cambridge Lectures) 113, at 115.

⁵ G.S. Goodman and V.S. Helgeson, "Child Sexual Assault: Children's Memory and the Law" (1988), 12 *Prov. Judges J.* 17, at 25-26.

⁶ Law Reform Commission of Western Australia, *Discussion Paper on Evidence of Children and Other Vulnerable Witnesses* (Perth, Australia: April 1990), at 11. See, also, C.L. Marchese, "Child Victims of Sexual Abuse: Balancing a Child's Trauma Against the Defendant's Confrontation Rights - *Coy v. Iowa*" (1990), 6 *J. Contemp. Health L. & Pol'y.* 411, at 415.

⁷ Goodman and Helgeson, *supra*, note 5, at 25-27; and G.S. Goodman, J.M. Golding and M.M. Haith, "Jurors' Reactions to Child Witnesses" (1984), 40 *J. Soc. Issues* 139, at 146-48. See, also, Spencer and Flin, *supra*, note 1, at 225, 227-28, 257, 294-96.

⁸ J. McEwan, "Child Evidence: More Proposals for Reform", [1988] *Crim. L. Rev.* 813, at 820.

difficult for adult witnesses to give their evidence cause even greater problems when the witnesses are children".⁹

The Commission is of the view that legislation ought to be introduced which accommodates children who give evidence in civil proceedings. The reforms which the Commission recommends have dual objectives:

- (1) to alleviate the stress imposed by the legal system on the child witness in order to minimize or eradicate the psychological harm to the child; and
- (2) to facilitate the giving of reliable evidence by young witnesses.

Children must be protected in the court process in order to effectively tell their story. Psychological research has demonstrated that stress beyond a certain point makes it more difficult for witnesses to order their thoughts and to provide accurate information from memory.¹⁰ Extreme anxiety of a child may render her testimony incoherent, incomplete, or without any probative value.¹¹ The Commission is of the firm belief that modification of the manner in which testimony is provided will enhance the ability of the court to ascertain the truth. The vulnerability of children must be acknowledged and accommodated so that children can be effective witnesses.

The Commission is in agreement with the Scottish Law Commission that the protections should not be restricted to children who have been victims of sexual abuse but rather should be available to all child witnesses in civil proceedings.¹² It is interesting to note that the Scottish Law Commission has proposed that protective mechanisms such as closed-circuit television, the use of screens, and pre-trial depositions, should also be available to adult witnesses.¹³

2. SCREENS

A principal reason why a child refuses to testify in court is the fear of being face-to-face with the party against whom she will tender evidence.¹⁴

⁹ Spencer and Flin, *supra*, note 1, at 70.

¹⁰ *Ibid.*, at 230.

¹¹ *Ibid.*, at 282.

¹² Scottish Law Commission, *Report on the Evidence of Children and Other Potentially Vulnerable Witnesses* (Edinburgh, Scotland: 1989), at 3 and 24-25.

¹³ *Ibid.*, at 35.

¹⁴ Graham, *supra*, note 4, at 229; and Marchese, *supra*, note 6, at 415-16. See, also, Law Reform Commission of Western Australia, *supra*, note 6, at 11.

The erection of a screen in the courtroom, which physically separates the child from the party, is stated to have the effect of reducing the trauma to the child as well as fostering an atmosphere in which the child can give an accurate and full account of what transpired.¹⁵ Screens have been used for a considerable period of time in England.¹⁶ Furthermore, Wales¹⁷ and many U.S. states¹⁸ have passed legislation which allows the use of screens in the courtroom. Several law reform bodies such as the Scottish Law Commission¹⁹ and the Law Reform Commission of Ireland²⁰ have also advocated the use of screens for child witnesses.

The federal government in the 1988 amendments to the *Criminal Code* introduced a provision which permits the use of a screen in limited circumstances.²¹ Unfortunately, due to the restrictive language in section 486(2.1) of the *Criminal Code*,²² the screen is not available to a vast number of child witnesses who testify in criminal proceedings. The section provides:

486.-(2.1) Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273 and the complainant is, at the time of the trial or preliminary inquiry, under the age of eighteen years, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room or behind a screen or other device that would allow the complainant not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.

Section 486(2.1) of the *Criminal Code* is restricted to the sexual offences enumerated in the provision and is therefore, not applicable to other types of criminal proceedings. In addition, the screens are only

¹⁵ *London Child Witness Project* (London, Ont.: November 1990), at 22; and Spencer and Flin, *supra*, note 1, at 83.

¹⁶ See discussion in Law Reform Commission of Western Australia, *supra*, note 6, at 60; and Law Reform Commission of Ireland, *Report on Child Sexual Abuse* (1990), at 70.

¹⁷ See discussion in Scottish Law Commission Report, *supra*, note 12, at 19.

¹⁸ D. Whitcomb, "When the victim is a child: Past hope, current reality, and future promise of legal reform in the United States" in J.R. Spencer, G. Nicholson, R. Flin and R. Bull (eds.), *Children's Evidence in Legal Proceedings[: An International Perspective* (Papers from an International Conference, Selwyn College, Cambridge Lectures, England: June 1989) 133.

¹⁹ *Supra*, note 12, at 39.

²⁰ Law Reform Commission of Ireland, *supra*, note 16, at 70-71.

²¹ R.S.C. 1985, c. C-46, s. 486(2.1), as enacted by R.S.C. 1985, c-19 (3rd Supp.), s. 14.

²² *Ibid.*

available to the child victim who has allegedly been sexually abused. It does not extend to child witnesses other than the complainant who may feel equally intimidated by the accused.²³ Furthermore, the test stipulated in section 486(2.1) of the *Criminal Code* is difficult to satisfy—a child is only allowed to testify from behind a screen if the judge is “of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant”. In other words, in circumstances in which a child is capable of providing the court with an account of what occurred, she is not permitted to have the protection of a screen even though testifying face-to-face may result in severe psychological damage to the child. As Morden A.C.J.O. observes in *R. v. Levogiannis*, it is clear that the “prevention of trauma is not the expressed object of our legislation”.²⁴

An excellent example of the restrictiveness of section 486(2.1) of the *Criminal Code* is found in *R. v. Paul M.*²⁵ In this case, the accused was charged with sexual assault and gross indecency on a twelve-year old girl contrary to the *Criminal Code*.²⁶ The accused had been residing with the complainant and her mother at the time the acts allegedly occurred. The Ontario Court of Appeal held that the trial judge erred in allowing the child to testify behind a screen as it was not “necessary” in order for the child victim to give “a full and candid account”.²⁷ Although the child complainant had repeatedly stated that she did not want to testify face-to-face with the alleged perpetrator of these offences (“I don’t like him. I don’t want to know that he’s here”),²⁸ it did not meet the requirements of section 486(2.1) of the *Criminal Code*.

A study conducted by the London Child Witness Project found that children who did have the benefit of a screen were greatly assisted in providing their evidence to the court.²⁹ However, it was stated that the test prescribed in section 486(2.1) of the Code constituted a major impediment to obtaining this protective device for the many children who offer testimony in sexual abuse cases. Only a small percentage of the Crown counsel who

²³ C. Stewart and N. Bala, *Understanding Criminal Prosecutions for Child Sexual Abuse: Bill C-15 and the Criminal Code* (Toronto: Institute for the Prevention of Child Abuse, 1988), at 29.

²⁴ *Supra*, note 3, at 375.

²⁵ (1990), 1 O.R. (3d) 341, 42 O.A.C. 153 (subsequent references are 1 O.R. (3d)).

²⁶ *Supra*, note 21.

²⁷ *Supra*, note 25, at 346-47.

²⁸ *Ibid.*, at 344-46.

²⁹ *London Child Witness Project, supra*, note 15, at 22.

requested screens were successful.³⁰ According to the report, the "formality of the application procedure and the difficulty in obtaining screens for young child witnesses is unnecessary and not in keeping with the spirit of the legislation to make child witnesses feel more comfortable in the courtroom setting".³¹

Section 486(2.1) of the *Criminal Code* has undergone several constitutional challenges since it was introduced in 1988. In the recent decisions, *R. v. Levogiannis*³² and *R. v. Paul M.*,³³ the Ontario Court of Appeal held that section 486(2.1) does not violate section 7 or section 11(d) of the *Charter*.³⁴ The Court stated that the effect of section 486(2.1) is simply to block the complainant's view of the accused – defence counsel, the accused, and Crown counsel are able to see the child while she testifies.³⁵

With respect to section 7 of the *Charter*, the Court stated that the right of an accused to be in the sight of the witness who testifies against him is not an absolute right; rather, it "is a right which is subject to qualification in the interests of justice".³⁶ Similarly, Morden A.C.J.O. did not accept the argument that the erection of a screen in a courtroom infringes the presumption of innocence in section 11(d).³⁷ The Court stated that the trial judge ought to instruct the jury that the use of the screen is permitted in cases of this kind by reason of the youth of the witness. It should also be explained that the screen is irrelevant to the issue of the guilt or innocence of the accused and that the jury should not draw any inference from its use.³⁸ The Court of Appeal stressed that section 486(2.1) of the *Criminal Code* was intended to enhance the reliability of the testimony of child witnesses and to promote the proper administration of justice.³⁹

³⁰ *Ibid.*, Figure 46, at 108.

³¹ *Ibid.*, at 108.

³² *Supra*, note 3.

³³ *Supra*, note 25.

³⁴ See, also, *R. v. Sharon B.*, unreported (May 29, 1990, Ont. Dist. Ct.); *R. v. D.H.* (1990), 105 N.B.R. (2d) 8, 55 C.C.C. (3d) 343 (Q.B.); and *R. v. M.E.R.* (1989), 90 N.S.R. (2d) 439, 49 C.C.C. (3d) 475 (S.C. App. Div.) (subsequent references are to 49 C.C.C. (3d)).

³⁵ *Supra*, note 3, at 358.

³⁶ *Ibid.*, at 367.

³⁷ *Ibid.*, at 373.

³⁸ *Ibid.*, at 371.

³⁹ *Ibid.*, at 374. Note that the United States Supreme Court similarly held in the 1990 decision of *Maryland v. Craig*, 58 L.W. 5044 (1990) that the confrontation rights in the Sixth Amendment are not absolute. The child witness need not physically face the accused and the courtroom can be arranged to protect the interests of child witnesses.

In 1989, the Saskatchewan Legislature amended *The Saskatchewan Evidence Act*⁴⁰ to provide for screens in civil proceedings. Section 42.1 provides:

42.1(1) Subject to subsection (2), where:

- (a) a witness is under 18 years of age; and
- (b) in the opinion of the presiding judge, the exclusion of the witness would assist in obtaining a full and candid account from the witness;

the presiding judge may order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the parties.

(2) A witness shall not testify outside the court room pursuant to subsection (1) unless:

- (a) arrangements are made for the parties, the judge and jury, if any, to watch the testimony of the witness by means of:
 - (i) closed-circuit television; or
 - (ii) a means, other than that mentioned in subclause (i), that allows the parties, the judge and the jury, if any, to watch the testimony of the witness; and
- (b) the parties are permitted to communicate with counsel while watching the testimony of the witness.

Section 42.1 of the Saskatchewan Act adopts the "full and candid test" of section 486(2.1) of the *Criminal Code* and consequently, the mental health of the child is not a relevant consideration. However, the Saskatchewan legislation is broader than its federal counterpart in that screens are available to any child witness under eighteen years. This protective mechanism is not restricted to child victims and it is not limited to proceedings in which sexual abuse of a child is alleged.

Justice O'Connor states: "The Confrontation Clause does not guarantee criminal defendants an *absolute* right to a face-to-face meeting with witnesses against them at trial. The general rules of law must give way to considerations of public policy and the necessities of the case".

⁴⁰ *The Saskatchewan Evidence Amendment Act, 1989*, S.S. 1989-90, c. 57, s. 4, enacting ss. 42-42.3 of *The Saskatchewan Evidence Act*, R.S.S. 1978, c. S-16.

A similar provision to section 486(2.1) of the *Criminal Code* was also introduced by the British Columbia Legislature.⁴¹ Section 82 of the *Evidence Act*⁴² provides:

82.-(1) In a proceeding in which it is alleged that a person has been physically or sexually abused, the judge, justice or other presiding officer may order that that person testify outside the courtroom or behind a screen or other device that would allow that person not to see the person alleged to have committed the abuse if,

- (a) at the time the proceeding commenced, the person alleged to have been abused is under 19 years of age, and
- (b) the judge, justice or other presiding officer is of the opinion that the order is necessary to obtain a full and candid account of the alleged abuse from the person alleged to have been abused.

(2) A person referred to in subsection (1) shall not testify outside the courtroom under that subsection unless arrangements are made for

- (a) any other party to the proceeding,
- (b) the judge, justice or other presiding officer, and
- (c) the jury, if any,

to watch the testimony of that person by means of closed circuit television or otherwise, and the person alleged to have committed the abuse is permitted to communicate with his counsel while watching the testimony.

The screen is available to individuals under the age of nineteen and it is only applicable to victims of physical or sexual abuse. Like the Saskatchewan and federal legislation, the British Columbia provision adopts "the full and candid test" as a prerequisite to the erection of a screen in a courtroom.

The Commission recommends that the provincial government promulgate legislation which permits all child witnesses to testify from behind a screen. In cases in which a screen is used, provision must be made to enable the party against whom the child is tendering evidence to watch the child and to observe his or her demeanour while testifying. The Commission

⁴¹ *Miscellaneous Statutes Amendment Act (No. 2) 1988*, S.B.C. 1988, c. 46, s. 29, enacting s. 82 of the *Evidence Act*, R.S.B.C. 1979, c. 116.

⁴² *Ibid.*

takes the position that screens serve to minimize the stress imposed on a child who testifies in court and, as well, tends to promote the furnishing of reliable evidence by the young witnesses.

3. CLOSED-CIRCUIT TELEVISION

Testimony by closed-circuit television is available to child witnesses in many jurisdictions.⁴³ Live television link enables the child to be examined and cross-examined from outside the court in the comfortable and congenial atmosphere of a witness room.⁴⁴ Television cameras and screens are placed in the courtroom to enable the judge, jury, audience, and the parties, to see and hear the child testify.⁴⁵ Some legal systems permit the child witness to see but not hear the events in the courtroom. Others permit the child to see everyone in the court with the exception of the person against whom she is tendering evidence.⁴⁶

Closed-circuit television is considered to be an excellent protective device for the following reasons. First, it protects the child from the anxiety-inducing courtroom "full of strangers and rituals".⁴⁷ Second, it shields the child from physical confrontation with the party against whom she gives evidence.⁴⁸ A third advantage of closed-circuit television is that it "render[s] the child better able to tell his or her story, remember, and answer questions clearly and accurately".⁴⁹ In other words, it enables the court to obtain a more detailed and accurate account from the child witness. Finally, closed-circuit television has been credited with providing all the advantages of a child courtroom at considerably less cost.⁵⁰

⁴³ There is provision for testimony by closed-circuit television in the Canadian *Criminal Code*, *supra*, note 21, for sexual offences. In addition, children may testify by closed-circuit television in several U.S. states, in England, and in Australia. See Spencer and Flin, *supra*, note 1, at 84-90.

⁴⁴ See Scottish Law Commission, *supra*, note 12, at 21.

⁴⁵ See discussion in Law Reform Commission of Western Australia, *supra*, note 6, at 45.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*, at 48.

⁴⁸ Hobson, *supra*, note 1, at 702; and D. Whitcomb, E.R. Shapiro and L.D. Stellwagen, *When the Victim Is a Child: Issues for Judges and Prosecutors* (Washington, D.C.: Department of Justice, National Institute of Justice, August 1985), at 51.

⁴⁹ Law Reform Commission of Western Australia, *supra*, note 6, at 49.

⁵⁰ D.J. Foté, "Child Witnesses in Sexual Abuse Criminal Proceedings: Their Capabilities, Special Problems and Proposals for Reform" (1985), 13 *Pepperdine L. Rev.* 157, at 180.

Are there any disadvantages to testimony by closed-circuit television? It is argued that the trier of fact has no opportunity for direct contact with the witness and must rely for assessment of credibility on a television image with the possibilities of distortion or enhancement inherent in the use of cameras.⁵¹ It is also contended that a child, particularly an older child, who does not give evidence in open court is denied the "therapeutic effect" of testifying in court.⁵² Western Australia has proposed a unique solution to these two purported disadvantages of closed-circuit television. It is the child who testifies in the courtroom and it is the party who observes the child witness from another room by means of closed-circuit television link.⁵³

The 1988 amendments to the *Criminal Code*⁵⁴ included a provision which allows child witnesses to testify by closed-circuit television in narrowly circumscribed cases. Section 486(2.1) and (2.2)⁵⁵ (which also embodies the screen provision) provides:

486.(2.1) Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273 and the complainant is, at the time of the trial or preliminary inquiry, under the age of eighteen years, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room or behind a screen or other device that would allow the complainant not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.

(2.2) A complainant shall not testify outside the court room pursuant to subsection (2.1) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the complainant by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.⁵⁶

Testimony by closed-circuit television in the *Criminal Code* is confined to sexual offence cases and is solely available to complainants and not to

⁵¹ Law Reform Commission of Western Australia, *supra*, note 6, at 49.

⁵² *Ibid.*, at 50.

⁵³ *Ibid.*, at 48.

⁵⁴ *Supra*, note 21.

⁵⁵ *Ibid.*

⁵⁶ Although many provinces have not established properly equipped courtrooms, Quebec has a permanent closed-circuit television installed in the Montreal courthouse as well as a mobile unit which travels throughout the province. See J.-P. Senécal, *Children's Evidence in Custody and Protection Cases* (Calgary: National Family Law Conference, July 1990), at 12.

other child witnesses. The restrictive "necessary to obtain a full and candid account" is the test which must be satisfied. Thus, minimizing the stress of the child is not an objective of the provision.⁵⁷ To compound the restrictiveness of section 486, judges in Canada have been reluctant to grant applications pursuant to this provision of the Code.⁵⁸ It is noteworthy that British Columbia⁵⁹ and Saskatchewan⁶⁰ have passed legislation virtually identical to that of section 486(2.1) and (2.2) of the *Criminal Code*.

Section 486(2.1) and (2.2) of the *Criminal Code* have been the subject of constitutional challenges. For example, in *R. v. M.E.R.*,⁶¹ the Nova Scotia Court of Appeal held that section 486(2.1) and (2.2) do not infringe section 7 of the *Charter*. It was argued by defence counsel that closed-circuit television constitutes a violation of the right to a fair trial, as it denies the accused the right to confront his accuser.⁶² MacDonald J.A., in upholding the provision, stated:⁶³

The right to face one's accusers is not in this day and age to be taken in the literal sense. In my opinion, it is simply the right of an accused person to be present in court, to hear the case against him and to make answer and defence to it.⁶⁴

⁵⁷ Stewart and Bala, *supra*, note 23, at 29; and M.R. Rosenberg, "Recent Developments in Evidence" in *Criminal Law 1990* (Canadian Bar Association - Ontario, 1990 Institute of Continuing Legal Education Criminal Law), at 21.

⁵⁸ *London Child Witness Project*, *supra*, note 15, Figure 46, at 108.

⁵⁹ *Evidence Act*, *supra*, note 41, s. 82. Note, however, that the B.C. provision also applies to cases of physical abuse.

⁶⁰ *The Saskatchewan Evidence Act*, *supra*, note 40, s. 42.1. See discussion by D.A.R. Thompson, *Children Should Be Heard, But Not Seen: Children's Evidence in Protection Proceedings* (National Family Law Programme) (Calgary: July 1990), at H2-18.

⁶¹ *Supra*, note 34.

⁶² *Ibid.*, at 483.

⁶³ *Ibid.*, at 484.

⁶⁴ See, also, Twaddle J.A. in *R. v. Hiller* (1990), 66 Man. R. (2d) 174 (C.A.), at 178, who states: "Parliament has accepted that the evidence of a child who claims she was sexually abused should not be lost as a result of her fear or embarrassment at the prospect of giving evidence in front of the accused."

Closed-circuit television has been widely endorsed in many legal systems such as England,⁶⁵ Wales,⁶⁶ and New Zealand.⁶⁷ Thirty-three of the U.S.⁶⁸ states have also authorized closed-circuit television to transmit the child's testimony and image live into the courtroom. In Australia, legislation has been introduced in Queensland,⁶⁹ Western Australia,⁷⁰ the Australian Capital Territory⁷¹ and New South Wales.⁷² It is noteworthy that in New South Wales, it is *mandatory* in criminal proceedings involving an assault or abuse of the child under the age of ten, for the child to give evidence by closed-circuit television, unless there is no available court equipped with such facilities.⁷³ In the Australian Capital Territory, the court may order that the child give her evidence by closed-circuit television if:⁷⁴

- (1) if it is likely that the facts would be better ascertained by the use of such a device; or
- (2) it is satisfied that the child will suffer mental or emotional harm if required to give evidence in the courtroom.

The Court may make such an order on its own motion or on application by a party to the proceedings.⁷⁵

Several law reform bodies have proposed that statutes be passed which provide for testimony by closed-circuit television. For example, the Victoria

⁶⁵ *Criminal Justice Act 1988*, c. 33 (U.K.). See R.K. Oates, "Children as Witnesses" (1990), 64 *Aust. L.J.* 129, at 133. See, also, discussion in Law Reform Commission of Ireland, *supra*, note 16, at 70.

⁶⁶ Law Reform Commission of Western Australia, *supra*, note 16, at 47.

⁶⁷ See discussion in Law Reform Commissioner of Tasmania, *Child Witness* (1989), at 21.

⁶⁸ J.C. Robb and L.J. Kordyban, "The Child Witness: Reconciling the Irreconcilable" (1989), 27 *Alta. L. Rev.* 327, at 351.

⁶⁹ Oates, *supra*, note 65, at 133.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Crimes Act 1900* (N.S.W.), s. 405D. See discussion in Law Reform Commissioner of Tasmania, *supra*, note 67, at 13; Law Reform Commission of Ireland, *supra*, note 16, at 70; and Law Reform Commission of Western Australia, *supra*, note 6, at 46.

⁷³ *Ibid.*

⁷⁴ *Evidence (Closed Circuit Television) Ordinance 1989* (A.C.T.). The Ordinance provides for evidence given by a child (defined as a person under eighteen years) in particular types of proceedings. See discussion in Law Reform Commissioner of Tasmania, *supra*, note 67, at 19-20.

⁷⁵ *Ibid.*

Law Reform Commission in their report *Sexual Offences Against Children*⁷⁶ recommended that in sexual offence proceedings, all complainants under sixteen years old should be permitted to give evidence by closed-circuit television. The Commission stated that the decision whether to use this device in a particular case, should be a matter for the prosecution.⁷⁷ Furthermore, the Law Reform Commission of Ireland proposed that closed-circuit television should be the rule for *all* witnesses under seventeen years old, unless the Court, for special reasons, decides otherwise.⁷⁸ The Irish Commission is of the view that closed-circuit television is superior to that of the screen, as the latter requires the child to testify in the open courtroom and not in a relaxed environment.⁷⁹ An even more liberal approach is that of the Scottish Law Commission which proposed that closed-circuit television be available in all criminal and civil proceedings and that both adult and child witnesses be permitted to use this protective device.⁸⁰ In its opinion, the Court should have broad discretion to order testimony by closed-circuit television; any specified criteria in the legislation authorizing this protective device should be no more than examples of factors which the Court can consider.⁸¹

The Law Reform Commission of Ontario recommends that closed-circuit television be available to all child witnesses who offer testimony in civil proceedings. The Commission is of the view that testimony by television link will promote the furnishing of reliable evidence by the child witness. Furthermore, it is our belief that testifying by closed-circuit television will substantially reduce the stress imposed on a child who becomes involved with the legal system. In cases in which the child testifies by television link, the party against whom the child is tendering evidence must be permitted to communicate with counsel while watching the child's testimony. We further recommend that the statutory provision authorizing the use of closed-circuit television should be framed in a way which would allow a degree of flexibility

⁷⁶ (November 1988). The report is discussed in Law Reform Commissioner of Tasmania, *supra*, note 67, at 14-15.

⁷⁷ *Ibid.*

⁷⁸ Law Reform Commission of Ireland, *supra*, note 16, at 72.

⁷⁹ *Ibid.*, at 70.

⁸⁰ Scottish Law Commission, *supra*, note 12, at 21-25, 35-36, 39-40.

⁸¹ *Ibid.* The Scottish Law Commission, at 25, recommends that the following factors be taken into account by the court:

the age and maturity of the child; the nature of the offence; the nature of the evidence which the child is likely to be called on to give; the relationship, if any, between the child and the accused; the possible effect on the child if required to give evidence in open court; and the likelihood that the child may be better able to give evidence if not required to do so in open court.

in the use of equipment, and which would permit a change from one arrangement to another should circumstances make that desirable.

4. VIDEOTAPED INTERVIEWS AND VIDEOTAPED TESTIMONY

(a) VIDEOTAPED INTERVIEWS

Videotaping of children's evidence is another avenue whereby a child can be protected from having to recount the details of what she witnessed in an open courtroom.⁸² In fact, videotaping has been heralded as one of the most innovative responses to child witnesses.⁸³ Several legal systems, including Canada, have introduced this technology into the courtroom and several law reform bodies highly endorse testimony by videotape.⁸⁴

What are the positive features of videotaped interviews? First, it spares the child the trauma of repeated questioning. The tapes can be shared with the police, child protection agencies, and any other party investigating the particular event in which the child was involved.⁸⁵ Furthermore, when the tape is shown to the court, it minimizes the prospect that the testimony is so well rehearsed that it is no longer credible.⁸⁶ As one writer states, a well conducted interview captures the child's own terminology, facial expressions and emotional responses, and is influential in establishing the child's credibility.⁸⁷

The American experience with videotapes demonstrates that one of the principal advantages of videotaping a child's statement is that it encourages blameworthy individuals to take legal responsibility for their acts.⁸⁸ For example, videotapes have been extremely effective in securing confessions in

⁸² *London Child Witness Project*, *supra*, note 15, at 2.

⁸³ Foté, *supra*, note 50, at 175.

⁸⁴ See Spencer and Flin, *supra*, note 1, at 140-66.

⁸⁵ N. Bala, *Bill C-15: New Protections for Children - New Challenges for Professionals* (Toronto: Institute for the Prevention of Child Abuse, October 1988), at 18; R. Eatman, "Videotaping Interviews with Child Sex Offense Victims" (Winter 1986), 7 *Children's Leg. Rts. J.* (No. 1) 13; and Oates, *supra*, note 65, at 133.

⁸⁶ Whitcomb, Shapiro and Stellwagen, *supra*, note 48, at 60.

⁸⁷ B. McAllister, "Article 38.071 of the Texas Code of Criminal Procedure: A Legislative Response to the Needs of Children in the Courtroom" (1986), 18 *St. Mary's L.J.* 279, at 311; Goodman and Helgeson, *supra*, note 5, at 24.

⁸⁸ Bala, *supra*, note 85, at 19-20.

intra-familial sexual abuse cases.⁸⁹ In these cases, there is often guilt and ambivalence with respect to making an admission. Moreover, the non-offending parent and other family members frequently deny that the abuse occurred.⁹⁰ Thus, a videotape which captures the details of an event witnessed by a child encourages confessions and has the effect of encouraging family members to be supportive of the child.⁹¹

A videotaped interview in a relaxed setting within a reasonable time after the incident should serve to give the trier of fact a more accurate description of the event than testimony given months or even a year later in a more threatening environment.⁹² As Spencer and Flin⁹³ state, videotaped interviews:

enable the court to hear an unquestionably accurate account of what the child was saying about the incident at the time it first came to light, before time wiped certain details from his or her mind, and prompting or questioning by adults implanted others.

This view is shared by legal writers in Canada⁹⁴ and the United States,⁹⁵ as well as by the Pigot Committee in England,⁹⁶ the Scottish Law Commission⁹⁷ and the Victoria Law Reform Commission.⁹⁸

In the 1988 amendments to the *Criminal Code*,⁹⁹ the federal government introduced a provision on videotaped evidence of children. Section 715.1 of the *Criminal Code* provides:¹⁰⁰

⁸⁹ *Ibid.*, at 20; McAllister, *supra*, note 87, at 307; Goodman and Helgeson, *supra*, note 5, at 24.

⁹⁰ Bala, *supra*, note 85; Whitcomb, Shapiro and Stellwagen, *supra*, note 48, at 60; and McAllister, *supra*, note 87, at 307.

⁹¹ See authorities cited *supra*, note 90.

⁹² Bala, *supra*, note 2; *supra*, note 68, at 342; Marchese, *supra*, note 6, at 418-19; and J.C. Yuille, M.A. King and D. MacDougall, *Child Victims and Witnesses: The Social Science and Legal Literatures* (Ottawa: Department of Justice Canada, 1988), at 44.

⁹³ Spencer and Flin, *supra*, note 1, at 161.

⁹⁴ Bala, *supra*, note 2.

⁹⁵ Marchese, *supra*, note 6, at 418-19.

⁹⁶ See J. McEwan, "In the Box or on the Box? The Pigot Report and Child Witnesses", [1990] Crim. L. Rev. 363, at 364.

⁹⁷ Scottish Law Commission, *supra*, note 12, at 2.

⁹⁸ See discussion in Law Reform Commissioner of Tasmania, *supra*, note 67, at 14-15.

⁹⁹ *Supra*, note 21, s. 715.1, as enacted by R.S.C. 1985, c. 19 (3rd Supp.), s. 16.

¹⁰⁰ *Ibid.*

715.1 In any proceeding relating to an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

The severely limited scope of section 715.1 is obvious. First, the provision is confined to sexual offences. Second, like section 486(2.1) of the Code, it is solely available to complainants and to no other child witnesses. A third restriction imposed by section 715.1 is that the complainant must "adopt the contents of the videotape" "while testifying". In other words, videotaped evidence will not eliminate the need for the child to testify. Section 715.1 stipulates that the child must testify in person at the proceedings in order to be cross-examined and to adopt the contents of the videotape.

Section 715.1 of the Code has been severely criticized by several writers¹⁰¹ and has been referred to as "half an idea".¹⁰² The main criticism is that the provision insufficiently protects the child witness because it obliges the child to testify in open court.¹⁰³ This is in contrast to legislation passed in several U.S. states which permits videotaped testimony in lieu of live testimony.¹⁰⁴ In addition, the Rogers Report has recommended that the federal government reform the laws in sexual abuse prosecutions to permit videotaped evidence by any child witness, not solely the videotaped statements of the complainant or child victim.¹⁰⁵

The Saskatchewan Legislature introduced a provision on videotaped evidence of children¹⁰⁶ which is similar to section 715.1 of the Code. Section 42.2 of *The Saskatchewan Evidence Act* provides:¹⁰⁷

¹⁰¹ See, for example, *supra*, note 68, at 343-45; and Scottish Law Commission, *supra*, note 12, at 27-29.

¹⁰² *Supra*, note 68, at 343.

¹⁰³ *Ibid.*, at 342.

¹⁰⁴ J.R. Christiansen, "The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews" (1987), 62 Wash. L. Rev. 705, at 706.

¹⁰⁵ R.G. Rogers, *Reaching for Solutions[:] The Summary Report of the Special Advisor to the Minister of National Health and Welfare on Child Sexual Abuse in Canada* (Ottawa: Health and Welfare Canada, June 1990), recommendation 29, at 23.

¹⁰⁶ *The Saskatchewan Evidence Amendment Act, 1989*, *supra*, note 40, s. 4, enacting s. 42.2 of *The Saskatchewan Evidence Act*, *supra*, note 40.

¹⁰⁷ *Ibid.*

42.2. In any proceeding in which a witness was under 18 years of age at the time the events occurred about which he or she is testifying, a videotape:

- (a) that is made within a reasonable time after the events occurred;
and
- (b) in which the witness describes the events;

is admissible in evidence if the witness adopts the contents of the videotape while testifying.

It is noteworthy that the provision is not restricted to cases of sexual abuse but rather is available in all civil proceedings. In addition, the videotaped evidence of any child witness can be introduced at trial providing the requirements of section 42.2 are satisfied.

The videotape provision in section 715.1 of the *Criminal Code* has undergone constitutional scrutiny. In *R. v. Thompson*,¹⁰⁸ the Court held that section 715.1 violated sections 7 and 11(d) of the *Charter* and was not saved by section 1. In his brief judgment, MacKenzie J. stated that section 715.1 is contrary to the principles of fundamental justice as it permits an accused person to be convicted on the unsworn evidence of a child.¹⁰⁹ The Court also stressed that section 715.1 does not provide any safeguards to ensure the trustworthiness of the videotaped evidence.¹¹⁰ Finally, the Alberta Court held that section 715.1 could not be justified under section 1 of the *Charter*—the “arbitrary age limit” of 18 caused the provision to fail the proportionality test prescribed in *R. v. Oakes*.¹¹¹

In *R. v. D.O.L.*,¹¹² the Court declined to follow the *Thompson*¹¹³ interpretation of section 715.1. In Scollin J.’s opinion, an accused’s rights in

¹⁰⁸ (1989), 97 A.R. 156, 68 C.R. (3d) 328 (Q.B.) (subsequent references are to 68 C.R. (3d)). *R. v. Thompson* was cited with approval in *R. v. Christensen* (June 14, 1989, Ont. Dist. Ct.) (Transcript of proceedings reproduced by the Institute for the Prevention of Child Abuse).

¹⁰⁹ *R. v. Thompson*, *supra*, note 108, at 329.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*, at 330, referring to *R. v. Oakes*, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1. See critical analysis of *R. v. Thompson* by N. Bala in “Thompson: Charter Challenge to Videotaped Statements of Children—Two Views” (1989), 68 C.R. (3d) 331. See, also, *R. v. Laramée*, unreported (June 18, 1991, Man. C.A.).

¹¹² (November 15, 1989, Man. Q.B.) (Transcript of proceedings reproduced by the Institute for the Prevention of Child Abuse).

¹¹³ *Supra*, note 108.

sections 7 and 11(d) of the *Charter* are not infringed for the following reasons:¹¹⁴

- (1) section 715.1 requires that the videotape must be adopted by the child on the witness stand;
- (2) the child must meet the competency requirements in section 16 of the *Canada Evidence Act*; and
- (3) the child is subject to cross-examination.

The Court also held that even if section 715.1 violated sections 7 and 11(d) of the *Charter*, the provision was justified as a reasonable limitation under section 1. Scollin J. stated that the fact that section 715.1 applies to videotaped statements by any child does not render it "unreasonable" and hence outside the scope of the *Charter*.¹¹⁵ The Manitoba Court described section 715.1 as a "humane, decent, and sensible way for the law to go, and yet without prejudice to the accused".¹¹⁶

What are the arguments against the use of videotaped interviews in civil proceedings? It is asserted that if the interview is conducted in a suggestive manner, the truth or accuracy of the child's recollections will be seriously distorted or destroyed.¹¹⁷ However, this should not be considered a serious drawback as the court itself can assess the suggestiveness of the interview procedure.¹¹⁸ Furthermore, a judge always has the discretion to refuse to admit the videotape if its probative value is slight and its prejudicial effect is significant. Such a situation may arise if the interviewer extensively relies on leading questions or engages in threatening tactics to elicit the child's statement.¹¹⁹ Many suggest that a code of practice should be developed to provide guidelines respecting the appropriate techniques to be used in interviewing child witnesses.¹²⁰ For instance, current psychological literature indicates that the child witness should be questioned as soon as possible by one highly trained neutral interviewer. Suggestive and leading questions

¹¹⁴ *R. v. D.O.L.*, *supra*, note 112, at 30-31.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, at 16. Note that in *R. v. Meddoui*, 77 Alta. L.R. (2d) 97, 61 C.C.C. (3d) 345, the Alberta Court of Appeal admitted the videotaped evidence of a child pursuant to s. 715.1 of the *Criminal Code*, *supra*, note 21. Moreover, *R. v. Kilabuk* (1990), 60 C.C.C. (3d) 413 (N.W.T.S.C.), has upheld the constitutionality of s. 715.1 of the *Criminal Code*.

¹¹⁷ *Supra*, note 68, at 342.

¹¹⁸ Christiansen, *supra*, note 104, at 714.

¹¹⁹ Bala, *supra*, note 111, at 340.

¹²⁰ McEwan, *supra*, note 96, at 365.

should be avoided.¹²¹ It has also been recommended that rules be established regarding the availability of the videotapes in order, for example, to prevent the tapes from appearing on media broadcasts which, undoubtedly, will cause significant harm to the child.¹²²

Another argument against videotaped evidence is that it prejudices the party to the litigation by allowing allegations to be made against him by witnesses whose evidence he is unable to challenge by cross-examination.¹²³ This criticism has resulted in the introduction in many jurisdictions of videotaped testimony, which will now be discussed.

(b) VIDEOTAPED TESTIMONY

In this innovative procedure, the child is examined and cross-examined in advance of trial before a judge.¹²⁴ A video-recording of the proceedings is then presented at trial in place of the appearance of the child.¹²⁵

Videotaped testimony, or a videotaped deposition as it is referred to in many jurisdictions, takes place in a small and congenial room in order to minimize the anxiety associated with giving evidence.¹²⁶ The proceedings are informal; the child, judge, and counsel sit together at a table and the judge and lawyers do not wear legal garb. The child is examined and cross-examined by each counsel. Although the party against whom the child is tendering evidence is not physically present in the room with the child, he can view the proceedings through a one-way screen or through the medium of closed-circuit television. The party communicates with his lawyer by means of a microphone and an earpiece. Once the testimony is videotaped, the child is free of all further court obligations.¹²⁷

¹²¹ Bala, *supra*, note 85, at 22; and Goodman and Helgeson, *supra*, note 5, at 27.

¹²² D. Whitcomb, "Assisting Child Victims in the Courts: The Practical Side of Legislative Reform" (American Bar Association, Papers from a National Policy Conference on Legal Reforms in Child Sexual Abuse Cases), at 20. See, also, Yuille, King and MacDougall, *supra*, note 92, at 44.

¹²³ Spencer and Flin, *supra*, note 1, at 157. See, also, V. Paisley, "Testimony by the Child Witness in Criminal Court: Tactical and Ethical Issues in Examining and Cross-Examining a Child Complainant" (Toronto: March 1988).

¹²⁴ Spencer and Flin, *supra*, note 1, at 142; Scottish Law Commission, *supra*, note 12, at 18-19; Law Reform Commission of Ireland, *supra*, note 16, at 72-73; and Law Reform Commissioner of Tasmania, *supra*, note 67, at 1.

¹²⁵ See authorities cited *supra*, note 124.

¹²⁶ *Ibid.*

¹²⁷ Parker, *supra*, note 1, at 669.

Videotaped testimony has been endorsed by many observers. It is stated that this procedure substantially reduces the stress imposed on the child witness for the following reasons:¹²⁸

- (1) the tape is shown as a substitute for the production of the child at the trial;
- (2) the child will not have to endure the anxiety associated with waiting months or even a year for the trial to take place; and
- (3) the videotaped deposition is informal and is held in a congenial environment.

For these reasons, it is argued that videotaped testimony increases the likelihood that the child will provide an accurate and detailed account of what she witnessed.¹²⁹ It is also important to remember that the right of counsel to cross-examine the child is preserved under this procedure.¹³⁰ As Spencer and Flin state, it is difficult "to accept that in the case of a young or highly traumatised child, a cross-examination conducted by an advocate in open court months or even years after the event has a greater chance of extracting the truth than the alternative method of testing the evidence by questioning at the time the video deposition is taken".¹³¹

Videotaped depositions for child witnesses are permitted in continental legal systems as well as in common law jurisdictions.¹³² For instance, New South Wales,¹³³ the Scandinavian countries¹³⁴ and several U.S. states¹³⁵ permit a videotaped deposition to be presented at trial in lieu of a court appearance. This procedure has also been recommended by the Scottish Law Commission,¹³⁶ the Law Reform Commission of Ireland,¹³⁷ the Pigot

¹²⁸ Spencer and Flin, *supra*, note 1, at 158; Scottish Law Commission, *supra*, note 12, at 124; R. Eatman and J. Bulkley, *Protecting Child Victim/Witnesses* (American Bar Association, National Legal Research Center For Child Advocacy and Protection, February 1986), at 21.

¹²⁹ Spencer and Flin, *supra*, note 1, at 164.

¹³⁰ See authorities cited, *supra*, note 124.

¹³¹ Spencer and Flin, *supra*, note 1, at 158.

¹³² D. Glaser and J.A. Spencer, "Sentencing, Children's Evidence and Children's Trauma", [1990] *Crim. L. Rev.* 371, at 377.

¹³³ See discussion in Law Reform Commissioner of Tasmania, *supra*, note 67, at 12-14.

¹³⁴ Spencer and Flin, *supra*, note 1, at 157.

¹³⁵ Marchese, *supra*, note 6, at 419.

¹³⁶ *Supra*, note 12, at 18-19.

¹³⁷ *Supra*, note 16, at 73.

Committee in England,¹³⁸ and the Law Reform Commission of Tasmania.¹³⁹

(c) RECOMMENDATION

The Commission is of the view that legislation ought to be introduced which permits videotaped interviews of a child witness to be presented at trial. A significant number of judges have held that in the absence of a statutory provision allowing videotapes, such evidence is inadmissible.¹⁴⁰ The Commission therefore recommends that videotaped interviews of child witnesses should be admissible, if, in the judges discretion, the videotapes are sufficiently reliable. Since videotaped interviews are tantamount to hearsay evidence, the same test of admissibility for hearsay evidence enunciated in chapter 4 should apply to the videotaped out-of-court statements of a child witness.

The Commission also proposes that videotaped testimony should be available to child witnesses in Ontario. We subscribe to the view that such a procedure significantly reduces the stress imposed on a child and, as well, increases the probability that the court will receive a complete account from the child witness. The following comments aptly describe the benefits of videotape technology:

There can be no doubt that some forms of videotaping legislation have enabled justice to be done in desperately serious cases where it would otherwise have failed.¹⁴¹

It is clear that the traditional manner of taking evidence is undergoing a searching re-examination in the light of modern technological developments and that video-recording is being seen as a way of using that technology to treat child witnesses more humanely.¹⁴²

¹³⁸ Spencer and Flin, *supra*, note 1, at 323.

¹³⁹ Law Reform Commissioner of Tasmania, *supra*, note 67, at 1.

¹⁴⁰ See *Khan v. College of Physicians and Surgeons of Ontario* (1990), 76 D.L.R. (4th) 179 (Ont. (Gen. Div.) Div. Ct.), at 190-91; and *Catholic Children's Aid Society of Metropolitan Toronto v. Nedeljko S.*, *supra*, note 1, at 3-4.

¹⁴¹ Spencer and Flin, *supra*, note 1, at 143.

¹⁴² Law Reform Commission of Western Australia, *supra*, note 6, at 45.

5. THE ROLE OF JUDGES

Judges have a crucial role to play in ensuring that the court is not a hostile environment for the child witness.¹⁴³ Every judge in Ontario has the inherent jurisdiction to control his own process for the proper administration of justice.¹⁴⁴ Therefore, it is incumbent on members of the judiciary to ensure that the examination and cross-examination of child witnesses are conducted "with due regard for the dignity and legitimate privacy of the witness and without seeking to intimidate or humiliate them".¹⁴⁵

To avoid confusion or intimidation of the child witness, examination and cross-examination should be carefully monitored by the judge.¹⁴⁶ As stated in *Re Kathleen R.*,¹⁴⁷ the judge does have a clear role to play "to ensure that the adversary process is not misused". Judges can caution lawyers who adopt an authoritarian or ingratiating stance.¹⁴⁸ Moreover, judges can assure that all proceedings in which a child is involved are conducted in language which is easily comprehensible to the young witness.¹⁴⁹ Another measure that can be taken is to ensure that the physical surroundings are conducive to eliciting evidence from the child. For example, a child may feel more comfortable testifying from a location other than the traditional witness stand.¹⁵⁰ Furthermore, judges ought to give the child witness breaks at appropriate intervals in her testimony.¹⁵¹ The London Child Witness Project states that some children in Ontario have been cross-examined for 130 minutes without a recess.¹⁵²

¹⁴³ Bala, *supra*, note 2, at 12; and Whitcomb, *supra*, note 122.

¹⁴⁴ J. Wilson and M. Tomlinson, *Children and the Law* (2d ed.) (Toronto: Butterworths Ltd., 1986), at 325-26.

¹⁴⁵ American Bar Association, *Guidelines for the Fair Treatment of Child Witnesses in Cases Where Child Abuse is Alleged* (Washington, D.C.: May 1985), at 9-10. See, also, Spencer and Flin, *supra*, note 1, at 297.

¹⁴⁶ American Bar Association, *supra*, note 145, at 2; Goldman, Golding and Haith, *supra*, note 7, at 147-48; and McEwan, *supra*, note 96, at 366.

¹⁴⁷ *Supra*, note 1, at 37.

¹⁴⁸ Yates, *supra*, note 1, at 477.

¹⁴⁹ American Bar Association, *supra*, note 145, at 22; and Law Reform Commissioner of Tasmania, *supra*, note 67, at 2.

¹⁵⁰ American Bar Association, *supra*, note 145, at 22.

¹⁵¹ M. Mian, K. Haka-Ikse, M. Lefkowitz and C. McGoe, *The Child as Witness* (unpublished paper) (Toronto: March 1990), at 9.

¹⁵² *Supra*, note 15, Figure 47, at 109.

Many suggest that judges ought to receive education in child psychology, as well as instruction on specialized skills with which to communicate with child witnesses.¹⁵³ Yates argues that the education of judges is essential "because through the use of their discretion they can influence the whole conduct of a trial and thereby control the treatment of children and other vulnerable witnesses".¹⁵⁴ For example, familiarity with the results of research into children's memory, suggestibility, and the ability to differentiate fact from fantasy may dispel the myths surrounding children's evidence and give judges greater confidence in controlling the line of questioning adopted by some counsel.¹⁵⁵

The education of judges respecting child witnesses has been recommended by the Law Reform Commissioner of Tasmania¹⁵⁶ and the Law Reform Commission of Ireland.¹⁵⁷ The Ontario Law Reform Commission likewise endorses this proposal.

6. SUPPORT PERSONS

The close presence of a person providing emotional support for the child may be critical in reducing the psychological harm occasioned by testifying in court proceedings.¹⁵⁸ As the Scottish Law Commission states, "the presence, close at hand, of a parent or some other trusted adult can, in some cases, give a young child the reassurance that is required for evidence to be given clearly and confidently".¹⁵⁹ Several U.S. states,¹⁶⁰ as well as Queensland¹⁶¹ and South Australia,¹⁶² have passed statutes permitting

¹⁵³ Submissions to the Ontario Law Reform Commission Project on Child Witnesses. See, also, Western Australia Law Reform Commission, *supra*, note 6, at 59; and Yates, *supra*, note 1.

¹⁵⁴ Law Reform Commission of Western Australia, *supra*, note 6, at 59.

¹⁵⁵ *Ibid.*

¹⁵⁶ Law Reform Commissioner of Tasmania, *supra*, note 67, at 2.

¹⁵⁷ Law Reform Commission of Ireland, *supra*, note 16, at 84.

¹⁵⁸ American Bar Association, *supra*, note 145, at 23; McEwan, *supra*, note 8, at 821; and M. McGrath and C. Clemens, "The Child Victim as a Witness in Sexual Abuse Cases" (1985), 46 U. Mont. L. Rev. 229, at 233.

¹⁵⁹ Scottish Law Commission, *supra*, note 12, at 7. See, also, Ontario Medical Association's Committee on Child Welfare, *supra*, note 2, at 95.

¹⁶⁰ Whitcomb, *supra*, note 122, at 21.

¹⁶¹ *Criminal Code, Evidence Act and Other Acts Amendment Act 1989* (Qld.). See Law Reform Commissioner of Tasmania, *supra*, note 67, at 16-17.

child witnesses to have a supportive person present during court proceedings. For example, the provision introduced in the *Evidence Act* of South Australia¹⁶³ states that a child witness under the age of eighteen is entitled to have a support person in court and within reasonable proximity while she or he gives evidence. The choice of the support person is the child's, with the qualification that a witness or prospective witness cannot be chosen. The Rogers Report also recommends that legislation be passed to enable adults to accompany a child under twelve to the witness stand to ensure that the child is not intimidated by the court process.¹⁶⁴

The Ontario Law Reform Commission recommends that legislation be promulgated to allow a person supportive of the child witness to be present and accessible to the child at all times during her testimony.¹⁶⁵ The Commission is of the view that the choice of the support person should be the child's, with the proviso that unless the judge consents, it cannot be an individual who is involved as a witness in the proceedings.

7. CONCLUSION

The Commission believes that the introduction of protective devices into the courtroom such as screens, closed-circuit television and video technology, will satisfy the dual objectives of: (1) alleviating the stress imposed by the legal system on the child witness; and (2) facilitating the furnishing of reliable evidence by young witnesses. The Commission also subscribes to the view that the education of judges and provision for a support person for the child witness will foster an atmosphere in which the objective of the legal system—to ascertain the truth—will be more easily attained.

¹⁶² *Evidence Act 1929* (S.A.), s. 12(4) and (5). See discussions in Law Reform Commissioner of Tasmania, *supra*, note 67, at 17-18; and Law Reform Commission of Western Australia, *supra*, note 6, at 57.

¹⁶³ Law Reform Commission of Western Australia, *supra*, note 6.

¹⁶⁴ Rogers Report, *supra*, note 105, recommendation 29, at 23.

¹⁶⁵ The judge should instruct the support person that coaching of the child witness is prohibited.

CONCLUSION

Legislation which fundamentally changes the legal rules pertaining to child witnesses is greatly needed. Many of the common law and statutory rules applicable to child witnesses are based on erroneous notions about the reliability of children's evidence. As the report discusses, psychological studies conducted in the last twenty years show that the traditional views about children's evidence lack empirical foundation. Current research clearly indicates that children do have adequate cognitive skills to understand or to describe what they have witnessed, children can differentiate fact from fantasy, and children have an ethical sense and are no more likely to fabricate evidence than are adults.

The competency requirements in section 18 of the *Evidence Act* have made it extremely difficult for children to be qualified as witnesses and consequently, the trier of fact may be deprived of potentially highly probative evidence in its deliberations. The Commission recommends that the oath should be abolished and that a promise to tell the truth should be the standard required for children to furnish evidence in civil proceedings. We take the position that the oath requirement is essentially a test of religious understanding and commitment rather than a test of the ability of the child to comprehend the importance of being truthful. The transformation of Ontario from a religious to a largely secular society further accentuates the inappropriateness of the oath.

The corroboration requirement in section 18 of the *Evidence Act* as well as the cautionary instructions mandated by *Kendall v. the Queen* are responsible for transmitting negative views respecting children's evidence and should be statutorily abolished. These legal rules are based on the erroneous belief that children are unreliable witnesses either because they have greater propensity than adults to lie or because their memory is inferior to adult witnesses. Another important reason for the repeal of these legal requirements is that there is often no direct evidence, either physical or eyewitness, to corroborate the child's testimony. We also subscribe to the view that it is discriminatory to have such restrictive evidentiary rules for children and not for testimony furnished by adult witnesses.

The Commission recommends reform of the hearsay rule for the statements of children. In many cases, the hearsay evidence of the child may be the best evidence of the subject matter being litigated and may constitute the only substantive evidence of the subject of the proceedings. The Commission takes the position that providing the hearsay statement is

sufficiently reliable, the statement should be admitted into evidence. The trier of fact can then assess the weight to be accorded to the child's out-of-court statement. We believe that this recommendation will introduce clarity into the law and will permit what may be extremely probative evidence to reach the courts, without compromising the fundamental common law principles for the exclusion of hearsay statements.

The Commission also subscribes to the view that legislation ought to be introduced which accommodates children who give evidence in civil proceedings. The vulnerability of child witnesses must be acknowledged and the manner in which children give evidence accordingly modified. Legislation which authorizes videotaped testimony and which permits child witnesses to testify behind a screen or by closed-circuit television will help ensure that reliable evidence is presented and heard. Children should be protected in the court process in order to tell their story as easily, accurately and comprehensively as possible.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

1. The oath should be abolished as a test of competency for child witnesses. A simple promise to tell the truth should be the qualification requirement for child witnesses in Ontario civil proceedings.
2. Where in the opinion of the court, a child does not understand the promise to tell the truth, the judge shall nevertheless hear the evidence and may act on it if, at the end of the case, the judge is satisfied that the evidence is reliable.
3. The presumption that a child under fourteen years is an incompetent witness should be abolished. The Ontario *Evidence Act* should be amended to provide that all individuals, including children, are presumed competent witnesses.
4. The distinction between sworn and unsworn testimony for child witnesses should be abolished.
5. The corroboration rule in section 18(2) of the Ontario *Evidence Act* for the unsworn testimony of the child should be repealed.
6. A child's testimony should not be automatically labelled as untrustworthy and unreliable solely because the evidence is being offered by a child. The rule in *Kendall v. The Queen* should be statutorily abolished.
7. The hearsay statements of a child are admissible if, in the opinion of the judge, the statements are sufficiently reliable.
8. All child witnesses should be permitted to testify behind a screen. In cases in which a screen is used, provision should be made to enable the party against whom the child is tendering evidence to watch the child and to observe his or her demeanour while giving evidence.
9. All child witnesses should be allowed to testify by closed-circuit television. In cases in which the child testifies by closed-circuit television, the party against whom the child is tendering evidence should be permitted to communicate with counsel while watching the child's testimony.

10. Videotaped interviews of a child are admissible if, in the judge's discretion, the videotapes are sufficiently reliable.
11. Videotaped testimony of a child, in which the child is examined and cross-examined by counsel in advance of trial in the presence of a judge, should be permitted. Provision should be made to enable the party against whom the child is tendering evidence to view the proceedings through a one-way screen or through the medium of closed circuit television.
12. Child witnesses should be permitted to have the presence of a support person of their choice during their testimony. Unless the court consents, the support person should not be an individual who is involved as a witness in the proceedings.